No. 8138

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

LIQUID VENEER CORPORATION, a corporation,

Appellant,

vs.

LENA G. SMUCKLER,

Appellee.

BRIEF OF APPELLEE

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I.

COMMENTS ON APPELLANT'S STATEMENT OF THE CASE

For the sake of clarity, appellant will be referred to in this brief as defendant and appellee will be referred to as plaintiff.

Defendant in both a "Concise abstract of case" (App. Br., p. 3) and in a "Detailed statement of the case" (App. Br., p. 8) sets out with a great deal of repetition an attempted summary of the facts involved in this litigation.

Plaintiff will not chronologically recite the facts as a separate and distinct part of her brief, but suffice it to

say for the time being that defendant's statement of the case does not adequately present the vital issues; the forest has been lost sight of in the jungle of trees.

As various issues raised by defendant are discussed, the facts involved will be alluded to in detail.

II.

SERVICE OF PROCESS ON THE SECRETARY OF STATE WAS ENTIRELY PROPER

(a) When the Chaff is Separated From the Wheat, We Find That Six of the Nine of Defendant's Sub-arguments Under This Heading Are Entirely Non-controversial or Unimportant.

For 32 pages (App. Br., pp. 65 to 97) counsel for defendant laboriously attempts to build up an argument to the effect that the Liquid Veneer Corporation at the commencement of the suit was improperly served with process. So much of the discussion is mere repetition and so much more merely discusses elementary principles with which there can be no quarrel, that one begins to suspect that defendant has resorted to the age old devise of endeavoring to give weight to its argument by putting up straw men.

Nine separate sub-arguments are created to bolster the main thesis that the corporation was improperly served. With six of these sub-arguments there need be no controversy—they are the straw men, to-wit:

Sub-argument number 1 is a discussion of the applicable code sections of the State of California at the time

that the service of summons was made. (App. Br., p. 67.)

Sub-argument number 5. Proper service of process is absolutely necessary in order for a court to acquire jurisdiction or to proceed against a person named as a party defendant. (App. Br., p. 91.)

Sub-argument number 6. Removal of the case from the state court to the Federal court does not eliminate necessity of proper service. (App. Br., p. 92.)

Sub-argument number 7. Jurisdiction over the parties must affirmatively appear in the record itself and not in the Bill of Exceptions, and the question as to its existence may be raised at any time. (App. Br., p. 93.)

Sub-argument number 8. A petition for removal does not amount to a general appearance so as to deprive defendant of the right to raise the question of proper service of process. (App. Br., p. 94.)

Sub-argument number 9. Where want of jurisdiction appears, the Circuit Court of Appeals in remanding the cause to the District Court should direct a dismissal for want of jurisdiction. (App. Br., p. 95.)

Although defendant admits that this statement is not supported by authorities, we can pass it at this time as merely an academic discussion.

As a matter of fact it is extremely doubtful that the case should be dismissed even if process were defective. The more correct rule would seem to be the following:

6 Cyc. of Federal Procedure, 695:

> "Where the fault of jurisdiction below was lack of personal service or authorized appearance, re-

versal was made with directions to proceed accordingly and investigate irregularities in entering the appearance," citing:

Hatfield v. King, 184 U. S. 162, 46 L. Ed. 481, 22 Sup. Ct. 477.

Therefore, when we eliminate the non-controversial arguments, the gist of defendant's thesis is contained in sub-arguments number 2 (App. Br., p. 73), sub-argument number 3 (App. Br., p. 75) and sub-argument number 4 (App. Br., p. 78).

Reduced to simple understandable phraseology, defendant urges that the judgment in favor of plaintiff should be vacated and the case dismissed, because there is nothing in the record of the case to show that plaintiff had a right to serve the Secretary of State under the provisions of Section 406 (a) of the *California Civil Code*.

(b) The State Has the Right to Subject Foreign Corporations to Any Method of Service of Process so Long as it is Reasonably Effective in Bringing Due Notice to Defendant Corporation.

Defendant cites numerous cases tending to sanctify the indispensability of "personal" service in order to acquire jurisdiction over a defendant (App. Br., pp. 78 to 91).

There should be no dispute over this principle.

[1] *But defendant has completely failed to distinguish between the situation where the defendant is an individual person and where defendant is a foreign corporation.*

In the first place, there is no well defined distinction between "personal," "constructive" and "substituted" service. So much of defendant's complaint is on the ground that the inviolable right to "personal" service has been ignored, that it might be well by way of prelude to quote a pertinent paragraph from a great authority on the law of corporations.

Fletcher Cyc. Corporations, Vol. 9, Chap. 51, pp. 255 and 256:

> "In one sense, all service of process on corporations is either substituted or constructive, for the reason that the corporate entity is incapable of service other than through persons who represent it; but for practical purposes service on the proper officer or agent of the corporation is considered personal, rather than substituted or constructive, service. The difference between personal, substituted and constructive service is not well defined. Generally, however, 'personal service' means the actual delivery of the process to the person to be served, although service outside the state is generally referred to as constructive rather than personal service. 'Substituted service' is sometimes confined in its meaning to service by leaving a copy at the home of the person to be served. 'Constructive service' includes, in its most general form, service by publication, although undoubtedly the term is broad enough to

cover service on a state officer as provided for by statute.

"Strictly speaking, there cannot be personal service upon a corporation, as the corporate entity is incapable of service except through persons representative of it. Berg v. Associated Employers' Reciprocal, 47 Idaho 386, 279 Pac. 627.

"Service of process on a domestic corporation by service on the secretary or deputy secretary of state, although denominated by the statute 'personal service' is substituted, as distinguished from constructive, service; that is, it is service on a person who does not sustain any actual agency relation to the corporation but who is merely designated by the statute as an agent for the purpose of service of process. Rothrock v. Bauman, 73 Mont. 401, 236 Pac. 1077, citing Fletcher Cyc. Corp. (1st Ed.), Sec. 3005."

[2] *It is too well settled to admit of controversy that in the case of foreign corporations an entirely different set of principles control.*

Fletcher Cyc. Corp., Vol. 18, Chapter 67, p. 295:

"As already shown elsewhere, corporations are not entitled under the Constitution of the United States to all the privileges and immunities of citizens in the several states. Any state may, therefore, within certain limitations heretofore adverted to, prescribe the terms and conditions on which foreign corporations may act therein; and this power undoubtedly allows the state to prescribe the mode of service of process of its courts upon a foreign corporation doing business there, on the ground that the state may, if it sees fit, entirely exclude foreign

corporations from its borders. 'The right of each state to enact laws for the service of original notice or summons upon foreign corporations not authorized to do business in such state, within prescribed constitutional limitations, is well settled.' Or as the rule has been otherwise expressed: Where a corporation created by one state goes into another state for the purpose of transacting the business of the corporation through its officers, agents, employees, and servants there located, it may be required to appear personally before the courts of such state on any terms to which it has assented as a condition precedent to the right to engage in its corporate business within the state, or it may be required to respond personally to such method of service as the legislature of such state may provide, as long as the method prescribed by the legislature constitutes due process of law. And such statutes have been declared to be neither 'unreasonable nor in conflict with any principle of public law,' and their purpose of compelling corporations which do business in a certain jurisdiction to submit to the domestic forum the questions arising therefrom is held to be 'highly proper.' "

Bowers Process and Service, pp. 466, 467, 468, 469:

"The views just referred to have been drastically modified in later times to meet the necessities arising through the vast expansion of the business transacted by corporations beyond the bounds of the states of their origin, and to permit the courts of such as they enter to exercise their jurisdiction in the protection of the rights of their own citizens in the multiform situations arising from such extensive operations. According to the new view, when a corpora-

tion enters a foreign state and there transacts its business, it is legally present in that state and for jurisdictional purposes in actions brought against it, is in the same position as an individual who is present in such state, or is at least in a position analogous to that of such an individual. * * *

"Based upon the early *dictum* of the federal Supreme Court already referred to, that a corporation could have no legal existence outside the state of its creation, it has been announced with a positiveness that invites no argument, that such a corporation could not at common law be subjected to personal service of process beyond the state lines, and that only by force of a special statute could such be accomplished. A typical expression of such view was made by the Alabama court thus: 'Without legislative enactment, a foreign corporation could not be sued outside of the state of its domicile, for the reason there were no means provided by which service could be had upon it. By the common law, to maintain a personal action against a corporation, there must have been service of process upon the principal officer within the jurisdiction of the sovereignty creating it. The officer upon whom, in the sovereignty of its creation, service could be legally had, binding the corporation, it may be could be found in another jurisdiction, but he was not regarded as carrying with him his official functions, and service upon him there would not bind the corporation.' While the discussion of this question would perhaps be academic at this day on account of the fact that nearly all the states of the Union have legislated upon the subject, it is not amiss to express the view of the writer that the decisions referred to in this section would not stand up under the theory of the presence

of the corporation in the foreign state where it does business, nor do they comport with the pronouncements of the case of Barrow S. S. Co. v. Kane, that 'The manifest injustice which would ensue if a foreign corporation, permitted by a state to do business therein, and to bring suits in its courts, could not be sued in those courts, and thus while allowed the benefits, be exempt from the burdens, of the laws of the state, has induced many states to provide by statute that a foreign corporation, making contracts within the state, shall appoint an agent residing therein upon whom process may be served in actions upon such contracts. This court has often held that whenever such a statute exists, service upon an agent so appointed is sufficient to support jurisdiction of an action against the foreign corporation either in the courts of the state, or, when consistent with the acts of Congress, in the courts of the United States, held within the statutes, but it has never held the existence of such a statute to be essential to the jurisdiction of the circuit courts of the United States * * * the liability of a foreign corporation to be sued in a particular jurisdiction need not be distinctly expressed in the statutes of that jurisdiction, but may be implied from a grant of authority in those statutes to carry on its business there.' "

Fletcher Cyc. Corp., Vol. 18, Chapter 67, pp. 305 to 309:

"If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission, and corporations that subsequently do business in the

state are to be deemed to consent to such condition as fully as though they had specially authorized such agents to receive service of the process. And its admission to do business in the state is a sufficient consideration for such agreement. The same doctrine has been laid down in many other cases, state and federal, and it has been said to constitute a 'part of the common law' of this country.

"'A state,' it was said by Justice Field, 'may impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just, and such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of process.'

"As some of the state courts express the rule: 'It is well settled that (subject to constitutional limitations) a state may prescribe the terms upon which alone it will permit foreign corporations to do business within its borders. And where a state imposes as a condition, on which a foreign corporation may do business therein, that it accepts as sufficient the service of process upon certain designated officers or agents within the state, a foreign corporation

subsequently doing business in the state is deemed to assent to such condition, and to be bound by the service of process in the manner specified by the statute.' Of course, the consent of the corporation to be bound by such service of process is not an actual consent, but an implied one. It has been said to be 'a mere fiction, justified by holding the corporation estopped to set up its own wrong as a defense.' "

[3] *It has been repeatedly held that state statutes providing for service of process upon foreign corporations which come into the state to do business, if reasonable, afford due process of law.*

Hudson v. Georgia Casualty Company, 57 F. (2d) 757, 758;
Lafayette Insurance Company v. French, 18 How. 404, 15 L. Ed. 451;
St. Clair v. Cox, 106 U. S. 356, 1 Sup. Ct. 354, 27 L. Ed. 222;
New England Life Insurance Company v. Woodworth, 111 U. S. 138, 4 Sup. Ct. 364, 28 L. Ed. 379;
Mutual Reserve Fund Life Insurance Company v. Phelps, 190 U. S. 147, 23 Sup. Ct. 707, 47 L. Ed. 987;
Connecticut Mutual Life Insurance Company v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569.

In the *Lafayette* case, supra, the Supreme Court as early as 1855 laid down this principle:

"We consider this foreign corporation, entering into contracts made and to be performed in Ohio,

was under an obligation to attend, by its duly authorized attorney, on the courts of that State, in suits founded on such contracts, whereof notice should be given by due process of law, served on the agent of the corporation resident in Ohio, and qualified by the law of Ohio and the presumed assent of the corporation to receive and act on such notice; that this obligation is well founded in policy and morals, and not inconsistent with any principle of public law; and that when so sued on such contracts in Ohio, the corporation was personally amenable to that jurisdiction; and we hold such a judgment, recovered after such notice to be as valid as if the corporation had had its *habitat* within the; State; that is, entitled to the same faith and credit in Indiana as in Ohio, under the constitution and laws of the United States." (pp. 344 and 345.)

In *St. Clair v. Cox*, supra, this doctrine was reaffirmed:

"This doctrine of the exemption of a corporation from suit in a State other than that of its creation was the cause of much inconvenience, and often of manifest injustice. The great increase in the number of corporations of late years, and the immense extent of their business, only made this inconvenience and injustice more frequent and marked. Corporations now enter into all the industries of the country. The business of banking, mining, manufacturing, transportation, and insurance is almost entirely carried on by them, and a large portion of the wealth of the country is in their hands. Incorporated under the laws of one State, they carry on the most extensive operations in other States. To meet and obviate this inconvenience and injustice,

the legislatures of several States interposed, and provided for service of process on officers and agents of foreign corporations doing business therein. Whilst the theoretical and legal view, that the domicile of a corporation is only in the State where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other States and opened offices, and carried on its business there, it was, in effect, as much represented by them there as in the State of its creation. As it was protected by the laws of those States, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred. * * *

"The State may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a State permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he

can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. The decision of this court in Lafayette Insurance Co. v. French, to which we have already referred, sustains these views." (pp. 355, 356 and 357.)

[4] *It has been established for many years in conformity with this general principle, that a state statute permitting service of process on a foreign corporation by serving a state official is entirely valid and binding.*

(a) A general statement of the principle permitting service on a state official.

Fletcher Cyc. Corp., Vol. 18, Chapter 67, p. 461:

"The object of such statutes is to enable the courts of a state in which a foreign corporation has engaged in business to render personal judgment against the foreign corporation where it withdraws its agents from the state. Under statutes providing for service of process only upon agents or officers of foreign corporations, foreign corporations may come into the state, transact business, commit wrongs against its citizens, for which the only remedy is an action for damages, and before service can be made upon the agent or other officer named in the statute, such agent or officer can be withdrawn from the state, and leave the injured party practically without remedy. Statutes providing for the acquisition of jurisdiction over foreign corporations by service of summons by publication, where no agent or officer of the corporation is found in the state upon whom

process might be served, are likewise ineffective, for the power of the court, in cases of default, is limited under well-settled rules to rendering judgment in rem. Manifestly legislation of the character under consideration is salutary, and necessary to remedy such defects. But in order to render a personal judgment against a foreign corporation based upon service of process upon a prescribed state official, it is essential that the corporation be engaged in doing business in the state."

Fletcher Cyc. Corp., Vol. 17, Chapter 67, pp. 446 to 450:

"Foreign corporations, desiring to do business in the state, may be required by statute to appoint some state official, such as the secretary of state, to receive process in suits against them. The simple requirement, considered above, that foreign corporations shall designate a resident agent for process, is not always sufficient to accomplish the purpose sought to be attained. For the corporation may fail to comply with the requirement, or the agent appointed may resign, be removed, die or become incapacitated. And to meet such contingencies, provision is usually made for service of process on some state official, such as the secretary of state or, in case of foreign insurance companies, the commissioner or superintendent of insurance, or some other designated official, or upon some officer or stockholder of the corporation present in the state.

"Such legislation has been frequently called in question, and as frequently decided to be a valid exercise of the power residing in the states to exclude foreign corporations altogether from their borders, or to admit them upon such terms and condi-

> tions as the states may deem proper for the protection of their own interests and those of their citizens."

And such statute should be liberally construed to effectuate the end of bringing the foreign corporation before the forum.

Fletcher Cyc. Corp., Vol. 18, Chapter 67, p. 316.

> "Although statutes allowing suits against foreign corporations are in derogation of the common law, statutes which provide for service of process on foreign corporations should be liberally construed for the accomplishment of the purpose intended, namely, that of bringing such bodies into court. They are permitted to enter the state by comity only, and in the methods of subjecting them to the jurisdiction of the courts they cannot insist upon a technical or strict construction in their favor."

The modern point of view is that the main purpose of the process statute is to bring the foreign corporation before the court, and if the statute sets out different ways of accomplishing the same end, they are construed to be "cumulative" and not "exclusive."

Fletcher Cyc. Corp., Vol. 18, Chapter 67, pp. 322, 323; (footnote 17, p. 323).

> "Thus it is held that a statute providing that when suit is against a corporation, the summons may be executed by delivering a copy of the summons and complaint to the president, or other head thereof, secretary, cashier, station agent, or any other agent thereof, includes foreign as well as domestic corporations, and that other statutes making special pro-

visions for service on foreign corporation doing business in the state, when they are sued, are cumulative, for the greater convenience of those who desire to institute legal proceedings against such corporations, and to hold otherwise would be by judicial construction to render nugatory the statute first mentioned."

Citing: *Eagle Life Ass'n. v. Redden*, 121 Ala. 346, 25 So. 779. See §8771.

It is held in Nebraska that a statute providing that "a summons against a corporation may be served upon the president * * * chairman of the board of directors or trustees, or other chief officer, or, of its chief officer is not found in the county, by a copy left at the office or usual place of business of such corporation, with the person having charge thereof," applies to all corporations having an office or usual place of business in the state, whether a foreign corporation or one organized under the laws of the state, notwithstanding the existence of another statute providing that where a foreign corporation has a managing agent in the state, the service may be on such agent. The court said:

"It is the policy of our law to afford redress through our courts to any person aggrieved, whether a natural person or a corporation, and to apply the remedy, as far as possible, at the place where the injury was sustained. If a foreign corporation has an office in this state for the transaction of business, seeking thereby to promote its own interest, such office will also be its place of business where a summons may be served upon it; and a party aggrieved will not be required to go into another jurisdiction

to enforce his rights against it. It must take the burden with the benefit."

Chicago, B. & Q. R. Co. v. Manning, 23 Neb. 552, 37 N. W. 462.

(b) So it has been held that service of process on a foreign insurance company by serving the state insurance commissioner is valid.

Mutual Reserve Fund Life Insurance Company v. Phelps, (supra);

Ex parte Schillenberger, 96 U. S. 369, 24 L. Ed. 853;

Cartmell v. Mechanics' Insurance Company, 167 Tenn. 498, 71 S. W. (2d) 688.

(c) Consistent with the aforementioned principle, statutes providing for service of process on a foreign corporation by serving the Secretary of State have been uniformly held to be valid.

Fletcher Cyc. Corp., Vol. 18, Chapter 67, p. 463:

"The due process provision is not violated by a statute providing for service of process on a foreign corporation doing business in the state by service on the secretary of state in the event of such corporation having no agent residing in the state upon whom process may be served. Thus a statute providing that, if a foreign corporation doing business in a state shall fail to maintain therein an agent to receive service of process, it shall be bound by service of process upon a designated state official of the state is held to be constitutional, and not in violation of the constitutional provision that no state shall

make any law depriving any person of his property without due process of law."

St. Mary's Franco-American Petroleum Company v. West Virginia, 203 U. S. 193, 51 L. Ed. 144, 27 Sup. Ct. 132;

Wylie Permanent Camping Company v. Lynch, 195 Fed. 386;

Vance v. Pullman Company, 160 Fed. 707;

Silva v. Crombie Company, New Mexico, 44 Pac. (2d) 719.

For a detailed discussion see

1 *L. R. A.* (N. S.) 558.

(d) As if to completely demonstrate that there is no longer any sanctity to "personal service" (upon which defendant leans so unduly), it is only necessary to examine the reasoning of the courts which have uniformly held valid laws which nearly all the states have adopted for substituted service on non-resident motorists where the cause of action arose within the state.

Fletcher Cyc. Corp., Vol. 18, Chapter 67, p. 472:

"In many of the states statutes have been enacted and upheld which provide that nonresident automobilists who come into the state and inflict damage to person or property therein, may be served by leaving a copy of the summons with the secretary of state, and notifying the nonresident in a prescribed manner."

Calif. Gen. Laws 1935 (Deering) p. 1435, Act 5132 (Motor Vehicle Act) Sec. 404;

Bischoff v. Schnepp, 139 Misc. 293, 249 N. Y. Supp. 49;

Cahill's Ill. Rev. St. 1931, Ch. 95a, 21 (1);
N. C. Ann. Code 1931, §491(a);
1 *S. D. Comp. Laws* 1929, §2338-A.

See also:

80 *Pa. Law Review* 909;
32 *Mich. Law Review* 325-350;
82 *A. L. R.* 769.

(c) There Can be no Doubt That California Has Long Ago Ruled That Its Laws Permitting Service of Summons on a Foreign Corporation by Serving the Secretary of State Are Valid.

S. Olender v. Crystalline Mining Company, 149 Cal. 482 at 483 and 484, 86 Pac. 1082:

"Appellant is a foreign corporation created and existing under the laws of Great Britain and doing business in California. By an act of the legislature of this state, approved March 17, 1899, (Stats. 1899, p. 111), it is enacted that a foreign corporation doing business in this state must designate, by a writing filed with the secretary of state, some person as its agent upon whom process may be served, and that if it fail to do so, service of summons in civil actions against it may be served on the secretary of state. In the case at bar the defendant did not designate such agent, and service of summons was made on the secretary of state. The main contention made by appellant is that said act of the legislature is unconstitutional and void; but this contention is not maintainable. The positions taken are that the state cannot arbitrarily appoint as an agent for appellant one between whom and appellant there is no actual relation of principal and agent, that the law does not

require the secretary of state to communicate to a defendant any information of the service of summons, that if the service be held sufficient, appellant would have no notice of the proceeding and no opportunity to be heard, and therefore a judgment on such service would deprive appellant of his property without due process of law. These positions are not tenable. The cases of Keystone Driller Co. v. Superior Court, 138 Cal. 738, [72 Pac. 398], and Wiley v. Benedict Co., 145 Cal. 270, [79 Pac. 270], cited by respondent, are not direct decisions on the point, although they seem to assume the constitutionality of the act in question; but, upon principle, we think that the respondent's contention is clearly maintainable. When a foreign corporation undertakes to do business in this state it is bound to know the existing law as to its right to do such business; and in the case at bar the appellant knew that as a condition of its doing business here, it must, under the law, appoint an agent upon whom process could be served, and that if it refused to appoint such agent, service could be made on the secretary of state. There is nothing unjust or unconstitutional in such a law."

[1] The only limitation which has been placed upon this type of statute is that some decisions hold that the requirement of due process is not met unless provision is made whereby the Secretary of State actually notifies the defendant foreign corporation that suit has been filed against it.

Southern Railway Company v. Simons, 184 Fed. 959;

King Tonopah Mining Company v. Lynch, 232 Fed. 485.

The California statute until the year 1917 did not require the Secretary of State to actually notify the defendant corporation of the service of summons upon him.

Even then the Supreme Court of California in *Olender v. Crystalline Mining Company* (supra) held the statute entirely valid, simply saying *anent:*

> "The appellant would have had full notice of the commencement of the action, and an opportunity to be heard, if it had put itself in the position of having such notice by simply complying with the reasonable requirement of the law that it appoint an agent to receive such notice; and by its failure to do so indicated its willingness to have such notice given to the secretary of state. It is, therefore, in no position to invoke the constitutional doctrines that a defendant must have notice of an action against him and an opportunity to be heard therein." (p. 484).

The Supreme Court of California could have followed an earlier decision in *Willey v. Benedict,* 145 Cal. 601, (1904), in which case a default judgment was set aside for improper service on the Secretary of State; but the court refused to do so in the *Olender* case (supra).

However, several later California cases construing the California statute as existing before it was amended in 1917, indicated a lack of willingness to sustain default judgments where service was made on the Secretary of State but where no knowledge of the suit had been brought home to the defendant corporation.

See for example

Winston v. Idaho Hardware Company, 23 Cal. App. 211;

Holiness Church v. Metropolitan Association, 12 Cal. App. 445;
Knapp v. Bullock Tractor Company, 242 Fed. 543.

In order to strengthen the statute and to eliminate any doubt as to its affording "due process," the statute was amended in 1917 so as to make it the duty of the Secretary of State to notify the defendant corporation of the pending suit by registered mail. (Section 406(a), *California Civil Code* as amended 1921; this statute as appeared before 1917, was numbered Section 405 of the *California Civil Code.*)

Under the most stringent tests, there can be no doubt but that this statute as now amended and as it existed at the time of the service of process on the defendant in the case at bar, was entirely constitutional and binding.

[2] The case of *Willey v. Benedict* (supra) is neither applicable nor controlling.

Appellant leans heavily upon the case of *Willey v. Benedict* (supra) which has some language indicating that service of process on the secretary of state is improper unless there is an affirmative showing in the record that service could not have been made upon an agent designated by the defendant foreign corporation or if none had been designated, that there is evidence in the record to that effect.

This decision—and it stands alone not having been followed by any California Supreme Court decision in which a holding based on that case would be necessary—is readily distinguished from our instant case:

(a) In the first place, a judgment by *default* had been obtained; and

(b) In the second place, being a default case, there was no record from which it would appear whether or not an agent had been designated to receive service for the defendant corporation and whether diligent search had been made for such an agent.

The case at bar presents an entirely different situation from that involved in *Willey v. Benedict* (supra), is that:

[1] The Liquid Veneer Corporation was actually notified of the pending suit; in fact it appeared and defended on its merits.

In this connection, it should be said *that every case without exception which defendant cites where service of process was held to be bad, was a default case. Naturally, in a default case, the court is more critical of all technical requirements.*

But inasmuch, as was indicated in *King, etc. v. Lynch* (supra), the whole purpose of the statute regulating process of service is to bring home to the defendant notice of the action, there is no need for any strained and technical interpretation where the defendant corporation actually appears and defends.

As the Supreme Court of California very pointedly said in *Olender v. Crystalline Mining Company* (supra):

> "The defendant does not ask to defend, it merely asks to be allowed to escape the necessity of making any defense."

The Court, therefore, in that case refused to set aside a default judgment on alleged irregularity of service of process on the defendant foreign corporation, where the motion relied on no grounds of fraud, inadvertence, etc., and where no offer was made to interpose a valid defense if the default were voided.

The same comment should be made respecting so many of the cases which defendant cites and where the "constructive" service of process spoken of is service by publication. Some justification can be made for a technical construction in this type of service, because where the summons is published, under most early statutes, there was little likelihood of the defendant actually being notified of the pendency of the suit. But in the case at bar, the defendant was actually given ample notice to appear and to defend itself, which it did to the best of its ability.

The point we are making, namely, that *Willey v. Benedict* (supra) loses its significance in view of the requirement of giving actual notice to the foreign corporation is fully demonstrated by the manner in which the case is commented upon in California Jurisprudence.

In 21 *Cal. Jur.* 495, *Willey v. Benedict* is cited as an authority for the following statement:

> "In all cases in which constructive service is permitted, or in which jurisdiction may be obtained of the thing by a prescribed form of notice, *where the real party in interest has no actual notice and does*

> *not appear* or subject himself to the jurisdiction of the court, the mode of service prescribed by the statute must be strictly pursued, and the existence of the conditions upon which such service depends must be affirmatively shown." (Italics ours.)

[2] The record in the case at bar clearly shows that there was no one else to serve but the Secretary of State.

In *Willey v. Benedict* (supra), the Court failed to find any evidence in the record of inability to serve an agent of the defendant corporation because:

> (a) "* * * in the first place, the statute does not provide for any certificate of the Secretary of State as evidence of that fact [that the defendant corporation had designated no person upon whom service might be made] in aid of the Sheriff's return or otherwise, and if it could be availed of at all, it does not pretend to be, and is no part of the return of the Sheriff" and
>
> (b) "Nor is it any part of the record, which in cases of judgment by default, consist of the summons, with affidavit or proof of service, the complaint, with a memorandum endorsed thereon of the copy of defendant's default, and a copy of the judgment."

Even if binding, this reasoning is no longer valid or applicable:

(1) The statute now distinctly makes the certificate of the Secretary of State evidence that no record of the foreign corporation or of any officers thereof have been filed with him.

Civil Code, §406a:

> "Upon receipt of such process and fee the secretary of state shall forthwith give notice to the corporation by telegraph, charges prepaid, both to its principal or home office and to its principal office in the state, of the service of such process, and shall forward to each of such offices by registered mail, a copy of such process, or in case he has no record of such corporation or such offices, then such notice shall be telegraphed and such copies shall be mailed to the corporation, at the address given in the statement delivered to the secretary of state at the time of such service. The corporation shall appear and answer within thirty days after the secretary of state gives notice as aforesaid. The certificate of the secretary of state, under his official seal, of such service shall be competent and sufficient proof thereof. The secretary of state shall keep a record of all process served upon him and shall record therein the time of such service and his action in respect thereto. [Added by Stats. 1931, p. 1832.]

and

(2) The case at bar not being a default, the Court may look to any part of the record to see whether there was an agent designated by the defendant corporation who could have been served.

Vaughn v. Pine Creek Tungsten Company, 89 Cal. App. 759;

Musser v. Fitting, 26 Cal. App. 746 at 751;

Rochl v. The Texas Company, 107 Cal. App. 691, 705.

14a *Corpus Juris*. 1419:

> "All the facts sustaining the jurisdiction need not appear from the return, however, if they otherwise are shown by the record * * *."

See also an intelligent statement of the rule in *Municipal Paving Company v. Herring*, 50 Okl. 470, 472, 150 Pac. 1067:

> "Plaintiff elects to proceed against the defendant under this section, and by having service made upon the Secretary of State impliedly states that the conditions under which the statute authorizes such service exists. To require him to make an affirmative showing to that effect would be to require him to prove something that no one knew better than the defendant itself. * * * We hold the service sufficient, in the absence of a showing by the defendant that it either had a service agent or an officer in the state upon whom process could be had."

We find the following clear uncontradicted evidence in the record that there was no one other than the Secretary of State who could or should have been served:

(1) Affidavit of Frank C. Jordan, Secretary of State:

> "I FURTHER CERTIFY that the records of this office do not contain the name of said defendant corporation, or show the location of its offices." (Tr., p. 27).

(2) Affidavit of Robert V. Jordan, Assistant Secretary of State:

> "That there are not now on file, nor have there ever been on file in the office of the Secretary of State any copies of the Articles of Incorporation of

Liquid Veneer Corporation, or any statement of Liquid Veneer Corporation of any kind or character, or any designation of any person as the agent of Liquid Veneer Corporation for services of process or authorized to receive service of process, or any consent of Liquid Veneer Corporation to any service or process of any document or paper of any kind or character for or on behalf of Liquid Veneer Corporation. That Liquid Veneer Corporation is not a corporation organized or existing under or by virtue of the laws of the State of California, and is not now and never has been at any time qualified to do business in the State of California." (Tr., pp. 54 and 55).

(3) Affidavit of Martin J. Cabana, Executive Vice-President of Liquid Veneer Corporation:

"That said Defendant above named is not now, nor has it ever been at any time, engaged in or been doing business in the State of California, nor has it at any time maintained an office or place of business anywhere within said State; that it has not now, nor has it at any time ever designated or authorized in the State of California any person, firm or corporation whatsoever to accept service of process upon it or otherwise; that at no time has Defendant above named ever had any officers, agents, person or persons upon whom process could be served residing in the State of California, nor has it ever had at any time any property, either real or personal, within said State, excepting goods 'in transit.' That at no time has the Defendant Corporation ever filed its Articles of Incorporation with the Secretary of State of the State of California or made any effort to

qualify itself to do business within the State of California and that it has never designated or authorized the Secretary of State of the State of California, or one E. C. Mack, or any other person within said State of California to receive or accept notices or summonses or other process for or on behalf of said corporation.

"That E. C. Mack, party to whom plaintiff herein caused certain papers herein to be mailed in the State of California, is not now, was not on the 1st day of March 1932, nor has he ever been prior to or since said date, an officer or agent of Defendant Corporation above named. That said Mack is a traveling salesman only, having no connection with Defendant other than soliciting orders for its products on a commission basis and that he travels in States other than California, including Washington and Oregon." (Tr., pp. 55 and 56).

(4) Affidavit of Fred D. Morgan, Secretary and General Manager of Liquid Veneer Corporation:

"That said Corporation has not now nor did it have prior to, since or on March 1st, 1932, the date upon which papers herein were mailed to the Secretary of State of California as deponent is informed, an office or place of business anywhere within the State of California; that it had no officers or agents in the State of California or elsewhere during any of said times mentioned; that it had no property, either real or personal in said State of California during the times mentioned excepting occasional merchandise in transit; that at no time has the Defendant above named ever designated any person or persons, firm, or corporation upon whom process could

be served within the State of California or elsewhere.

"That at no time has the Defendant Corporation ever filed its Articles of Incorporation with the Secretary of State of California or made any effort to qualify itself to transact business within the State of California and that it has never designated, appointed, authorized or otherwise empowered, the Secretary of State of the State of California, E. C. Mack or any other person or persons, or any firm or corporation within said State of California to receive or accept notice or summonses or other process for or on behalf of said corporation." (Tr., pp. 58 and 59.)

(5) Affidavit of E. C. Mack, salesman for Liquid Veneer Corporation on the Pacific Coast:

"That he is now and for some time has been a traveling salesman, his territory comprising the Pacific Coast area, which includes the States of Washington, Oregon, Nevada, Montana, Idaho and Northern California. That his duties are confined entirely to soliciting, within said territory, orders for the manufactured products of Liquid Veneer Corporation, of the City of Buffalo, State of New York, defendant above named, said orders being forwarded for acceptance by the said corporation at its Home Office in the City of Buffalo. That no sales are or have been made by affiant of any of defendant's goods, wares or merchandise within the State of California, affiant merely soliciting orders for defendant's manufactured products, which orders, as aforesaid, are transmitted to defendants at its home office in the City of Buffalo for acceptance." (Tr., p. 63.)

(6) The record clearly shows that service on E. C. Mack would have been improper and ineffective:

Obviously, the only possible capacity (under Section 406a of the *Civil Code of California*) that E. C. Mack could have according to the defendant's own contention is that of "general manager." The California cases have clearly held that by general manager is meant one who is empowered to perform any act which a corporation itself could lawfully perform and that he must be a genuinely binding executive of the corporation. Before the 1931 change of this quoted section, instead of general manager, appeared the term "managing agent." The obvious purpose of the change was to make it ineffective simply to serve a salesman, a solicitor or even an agent if he was not in fact empowered with full authority to be the corporation's general manager.

See *Greve v. Taft*, 101 Cal. App. 343.

Defendant has again fallen into the error of confusing the status of a foreign corporation's representative for different purposes. Although obviously E. C. Mack was an agent or representative of the Liquid Veneer Corporation, when the question of "doing business" in the State of California is concerned, yet just as obviously he could not be considered a "general manager" for the purposes of having service made upon him. With this state of facts therefore, it would have been foolhardy for the plaintiff to have simply relied upon serving E. C. Mack. Plaintiff followed the statute implicitly and served the Secretary of State and simply designated E. C. Mack

as the Pacific Coast Representative of the Liquid Veneer Corporation.

Summary

Can there be any fair doubt about the true situation? At the time appellant first moved to quash the summons, no idea was entertained whatever about the validity of the service. Every effort was made to show that defendant had no agent—serviceable or otherwise—in California, in order to try to convince the Court that appellant was not "doing business" in this state.

For the first time, after judgment, and in connection with its motion for new trial, defendant endeavored to seriously press this point. Then to conclusively demonstrate defendant's incalculable ability to blow hot and cold as the exigencies of the moment demand, defendant *attempted to completely withdraw its motion to dismiss on the grounds of improper jurisdiction.* (Tr., p. 239.)

We have taken more pains with this discussion than its lack of merit deserves, but we have done so to demonstrate the studied efforts of defendant to build up straw men so as to be able to knock down an imposing number of them.

The undue length of defendant's "Brief" which must be a burden both to this Honorable Court as it certainly is to plaintiff, is due in large measure to the further repetition by defendant of this same method of argument.

III.

THE LIQUID VENEER CORPORATION WAS "DOING BUSINESS" IN THE STATE OF CALIFORNIA AT THE TIME THAT SERVICE OF PROCESS WAS MADE.

As we have earlier indicated, the whole ponderous argument of defendant regarding alleged improper service of process was strictly on its relative importance entitled to very little attention, because after all, having appeared and defended, the only *sine que non* of the Court having fully acquired jurisdiction is whether or not the defendant was at the time it was served with process "doing business" in the State of California. We quite agree with counsel for defendant that if it was not "doing business" in California at that time, the District Court would have had no jurisdiction regardless of how the Secretary of State were served. And it is equally as true that if the defendant corporation was "doing business" in California at that time, the cause of action having arisen in California and the defendant being before it, the District Court indisputably acquired that jurisdiction over person and subject matter which is necessary to sustain the judgment.

We believe that it will lead to clear thinking if we first set out the applicable rules of law governing the principles of jurisdiction over a foreign corporation based upon that corporation "doing business" within the forum. With the law simplified and clarified, we feel that it will be a simple matter to apply that law to the proved facts in this case, and consequently to effectively convince this Honorable Court that the trial court properly held that there was jurisdiction.

(a) Clarification of the Applicable Law

[1] Cases defining what is "doing business" for the purpose of a foreign corporation qualifying to meet statutory requirements for "doing business" in a state, or for purposes of interpreting licensing and tax statutes, must be separated from those cases defining what is "doing business" for purposes of acquiring jurisdiction over a foreign corporation in case of suit against it.

For thirty pages in its Brief defendant has expounded its version of the law relative to service of summons upon foreign corporations "doing business" within the state of the forum. We have studied this Brief carefully and feel that counsel for the defendant has fallen into the very painless error of lumping together all kinds of decisions without properly segregating them. The law of "doing business" is conflicting and confusing unless proper segregation of the cases is made.

Fletcher, probably the country's most eminent commentator on the law of corporations, in his *Cyclopedia of Corporations* has stated the cause of confusion in very clear language. He says:

Fletcher Cyc. Corp., Vol. 17, §8465, pp. 468 and 469:

> "It may be observed here, however, that the business activities of a foreign corporation in a state may be of such a nature as to render it amenable to service of process in an action brought against it in the state, and yet not be sufficient to render it necessary for the corporation to qualify under the requirements of a statute imposing conditions and restrictions upon the right to do business in the state. In reaching their decisions as to what shall constitute

doing business within the terms of the latter acts, the courts are naturally inclined to be liberal on the side of the corporation, since severe penalties for noncompliance are frequently imposed, whereas the interests involved when a question of the sufficiency of service of process is raised are of a different nature. In view of the hardship which might result from the failure to uphold the jurisdiction, the tendency has been to assign a broad meaning to the term 'doing business' and to adopt a narrow standard as to what volume of business shall be necessary to bring the corporation within the term as used in acts relating to process upon foreign corporations."

Again, in *Fletcher Cyc. Corp.*, Volume 17, §8712, pp. 339, 340, 341, 342:

"It has been indicated heretofore that a distinction has been observed in this work and by the cases in determining on the one hand the nature and extent of the activities of a foreign corporation in a state to subject it to service of process therein on the ground that it is 'doing business' there, and the rules applied in construing the terms 'doing business' and 'transacting business' in qualifying statutes, and license and tax laws. As the courts have said in a number of decisions: What is meant by doing business in a given state or other locality is something approached from so many angles that the subject appears a mass of confusion. 'Doing business' for purposes of taxation; doing it within a statute requiring licenses, and doing enough business to justify the service of process are quite different things. The use of the same phrase makes confusion. That is to say, one of the causes of the confusion and lack of harmony in the cases is that the test of doing busi-

ness has been variously applied to three different legal purposes: (1) The necessity of a license under the licensing statutes; (2) the liability to a tax on corporate activities; (3) the subjection to service of process. Some courts have stated broadly that a foreign corporation may be doing business within a state to such an extent as to be liable to taxation or other undue burdens upon interstate commerce. The distinction between presence of a foreign corporation for service of process because doing business even exclusively interstate in nature, and its absence for purposes of taxation although doing such business, is well established. In a ruling American case the court said that 'where a foreign corporation is, in fact, doing business in the state, as that term is understood, it is immaterial what the commerce may be; they are 'here' within our jurisdiction. Decisions relating to taxing, licensing, or to state laws that impede the free flow of interstate commerce do not control the question of service of process.'

"The distinction between the classes of cases is aptly summed up as follows: 'The business which must be transacted by a foreign corporation to permit service of process must be such as to warrant the inference that the corporation is present. To subject such a corporation to taxation for doing business, the transactions must not only show that the corporation is present, but also that it is active. In order that qualification be rendered necessary, the corporation must not only be present and active, but its activity must be continuous.'

" 'It does not follow that statutes fixing the conditions under which a foreign corporation may engage in business in a state are to have the same construction as statutes permitting a foreign corporation

to be served in a state where it may be found. In the former it is, of course, a more or less continuing course of business which is meant to be regulated, whereas in the latter the object sought is only to give notice to a corporation of a pending action The tendency is to hold that whatever is reasonably effective for this purpose is a good service.'

"Accordingly whether a foreign corporation is doing business in the state so as to be subject to process in an action against it is distinct from the question of whether it is doing business in the state so as to bring it within the scope of a statute requiring foreign corporations doing business in the state to comply with certain prescribed conditions. For activities insufficient to make out a transaction of business, within the meaning of such a statute, may yet be sufficient to bring the corporation within the state so as to render it amenable to process. For example, 'doing business' to bring an alien corporation within the jurisdiction of the lower courts, does not mean that the corporation must maintain such a relation to 'doing business' in the state as to bring it within the statutory provision requiring a license for such operation. And cases involving motions to quash the service of process upon a foreign corporation are not controlling in the construction of statutes and constitutions requiring every foreign corporation 'doing business' in a state to file a copy of its charter with a designated officer."

Vicksburg, S. & P. Ry. v. De Bow, 148 Ga. 738, 98 S. E. 381, 384:

"As pointed out in Kendall v. Orange Judd Co., 118 Minn. 1, 136 N. W. 291, the question as to whether a foreign corporation is doing business in

the state, so as to be subject to the jurisdiction of the courts of the state, is entirely distinct from the question as to whether such a corporation is 'doing business' in the state within the purview of the act prescribing the conditions upon which corporations may be allowed to do business within the state, and that it does not follow that business which, by reason of the interstate commerce law, does not bring the corporation within the latter statute, may not nevertheless bring it within the statute providing for the service of process. A long line of cases, from probably every state of the Union, might be cited, in which a foreign corporation has been held not to be doing business within the state, so as to subject it to the requirements imposed upon such corporations doing business within the state. Where the interstate commerce law is the basis of the decision, this fact must be kept in view. See Auto Trading Co. v. Williams (Okla.), 177 Pac. 583."

Webster v. Doane, 137 Misc. 513, 241 N. Y. Supp. 242:

"In New York 'activities within this state, sufficient to constitute doing business within it, so as to render a foreign corporation amenable to process, yet may be insufficient to amount to doing business in the state, within the meaning of sections 15 and 16 of the General Corporation Law.' Pittsburgh & Shawmut Coal Co. v. State, 118 Misc. 50, 192 N. Y. Supp. 310. Activities of a foreign corporation in a state may be sufficient to make it amenable to service of process, though not constituting the doing of business within N. Y. Stock Corp. Law, and kindred statutes, relating to authority of foreign corporation."

With this cause for confusion and conflict now understood, we can state four primary rules which are well settled and which when applied to the facts in our case, clearly establish that the Liquid Veneer Corporation was and is doing business within the State of California.

[2] In spite of confusion and looseness of thought, the following rules have evolved as firmly established:

RULE 1.

A foreign corporation may be present in California sufficiently to make it amenable to our process even though if tested by other rules its business is entirely interstate.

Fletcher Cyc. Corp., Vol. 18, p. 345, Footnote 94:

> "The presence of a foreign corporation within the state, such as is necessary to the service of process upon it, is shown when it appears that the corporation is there carrying on business in such a sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character. Southeastern Distributing Co. v. Nordyke & Marmon Co., 159 Ga. 150, 125 S. E. 171, 174; Scene-in-Action Corp. v. Knights of Ku-Klux-Klan, 261 Ill. App. 153, 157."

Also on the same point see *Vicksburg, S. & P. Ry. v. De Bow* (supra).

Also see *George A. Hormel & Co. et al. v. Ackman*, 158 So. 171:

> "The fact that corporate business is interstate in character does not immunize the corporation from service of process in state courts."

See, also, *Knapp v. Bullock Tractor Co.*, 242 Fed. 543 (Sou. Dist. of Calif.):

> "Without in any wise, attempting to refer to these authorities, it suffices to say that, since the decision in International Harvester Co. v. Kentucky, 234 U. S. 579, 587, 34 Sup. Ct. 944, 58 L. Ed. 1479, the fact that a foreign corporation may be engaged in interstate commerce does not in any wise serve to render it immune from the assertion of jurisdiction by the state courts in any state in which it may be engaged in doing business, and in which appropriate provision is made by the law thereof for the assertion of jurisdiction over it. Atkinson v. U. S. Operating Co., 129 Minn. 232, * * *; Armstrong Co. v. N. Y. Central, 129 Minn. 104, * * *; L. R. A. 1916E, 232, Ann. Cas. 1916E, 335."

RULE 2.

Even if a foreign corporation limits its activities within the state of the forum, to soliciting orders for merchandise by its agent or agents, it is doing business within the state for the purposes of amenability to civil process if such solicitation is a continuous part of its business and is not just occasional or done in a single instance.

Fletcher Cyc. Corp., Vol. 18, pp. 379 to 382:

> "But the solicitation and forwarding of orders may constitute doing business, if a continuous and permanent course of business; a continuous and permanent business within the state, though consisting only of soliciting orders, is doing business. The rule has been laid down by the United States Supreme Court that where there is a continuous course of business in the state by the solicitation of orders

which are sent to another state, in response to which the subject matter thereof is delivered in the state where the order was taken and payment is received therein by money, notes, or checks, this constitutes doing business in such state, rendering the corporation subject to the process of its courts. The leading cases decided by the Federal Supreme Court upon this point are the so-called Green and Harvester cases. 'Possibly the maintenance of a regular agency for the solicitation of business will serve without more.'

"The tendency of the courts in recent years seems to be toward considering agents engaged in soliciting business as the representatives of the corporations for the purpose of the service of process. And in some states it is provided by statute that a foreign corporation engaged in 'soliciting business' shall be subject to the local jurisdiction."

See also *American Asphalt Roof Corp. v. Shonkland*, 205 Iowa 862, 219 N. W. 28, which follows the leading case of *International Harvester Co. of America v. Kentucky*, 234 U. S. 579, and where it is held that a foreign corporation that for many years has been engaged in a systematic and continuous course of business in the solicitation of orders, and the delivery and shipment of merchandise to numerous customers, is doing business within the state.

International Harvester Co. of America v. Kentucky, 234 U. S. 579, 58 L. Ed. 1479, 34 Sup. Ct. 944:

"As we have said, we think it was. Here was a continuous course of business in the solicitation of orders which were sent to another state, and in

response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction. The agents not only solicited such orders in Kentucky, but might there receive payment in money, checks, or drafts. They might take notes of customers, which notes were made payable, and doubtless were collected, at any bank in Kentucky. This course of conduct of authorized agents within the state in our judgment constituted a doing of business there in such wise that the Harvester Company might be fairly said to have been there, doing business, and amenable to the process of the courts of the state. It is agreed that this conclusion is in direct conflict with the case of Green v. Chicago, B. & Q. R. Co., 205 U. S. 530, 51 L. Ed. 916, 27 Sup. Ct. Rep. 595. We have no desire to depart from that decision which, however, was an extreme case."

The court then distinguishes the earlier case of *Green v. Chicago, B. & Q. R. Co.,* in 205 U. S. 530. This Honorable Court should note that the defendant in its brief relies strongly upon this *Green* case which is for practical purposes overruled by the *International Harvester* case.

See also:

Berryman v. The Cudahy Packing Company, decided November 26, 1934, Commerce Clearing House Court Decisions Reporting Service, Requisition No. 126800.

Summary:

"One Westerfield is employed by the Cudahy Packing Company, on salary. He lives in Arkansas, has an office there, and occupies himself in several coun-

ties of the state on behalf of his employer. He takes orders and makes collection. A small proportion of his customers remit direct to the company. On occasion a customer refuses to accept a shipment; in such a case Westerfield picks it up and transporting it in his own car (for the use of which the company pays him 4¢ a mile) sells the merchandise to another customer. New customers are sought, the extent of credit being recommended by Westerfield. The Arkansas Supreme Court, reversing the court below, holds that the company is doing business in Arkansas, and that Westerfield is more than a mere salesman but is an agent, because of his duties and functions and so that service on him on behalf of the company is valid service."

(a) There is, therefore, no conflict of opinion at all that where the orders of the foreign corporation's agent who solicits these orders are not subject to approval by the Home Office, the foreign corporation is "doing business" within the states where the orders are solicited.

In our own case, it will be easily seen later on that the orders either personally solicited by E. C. Mack, the defendant's California representative, or sent to him by California customers or else sent directly to the warehouse in San Francisco, WERE FILLED IN CALIFORNIA without the necessity of having the orders first approved by the Home Office of the Liquid Veneer Corporation at Buffalo, New York.

(b) Even where the order solicited in the state must first be approved by the Home Office outside of the state, there is considerable authority to the effect that the

foreign corporation would be considered as doing business in the state where the orders are solicited.

Alley v. Bessemer Gas Engine Co., 262 Fed. 94, (following *International Harvester Co. of America v. Kentucky* [supra]):

> "A foreign corporation soliciting orders through a local salesman, shipping machines in response to the orders, after approval at the home office, and collecting for the shipments in the foreign state through its local salesmen, is doing business in the state, so as to be subject to service of process."

See also: *Bogert & Hopper v. Wilder Mfg. Co.,* 197 App. Div. 773, 189 N. Y. Supp. 444, where it was held that a foreign corporation is doing business in a state where it exhibits goods at a fair held in the state and there takes orders for the sale of goods which are transmitted to its home office.

This Honorable Court should be especially receptive to the ruling of California Courts upon this question.

The case of *Milbank v. Standard Motor Const. Co.,* 132 Cal. App. 67, 70, should, therefore, be especially persuasive. In that case the Standard Motor Construction Company, a New Jersey corporation, was engaged in selling some of its engines in California. A certain engine when purchased by Milbank and after being installed in his boat developed mechanical defects. Upon complaint being made, the defendant corporation notified Milbank that it was sending a Mr. Runyon, a graduate engineer, as its representative, to aid and assist the customers in California with the maintenance and service of engines there-

tofore delivered in California. Mr. Runyon was not an officer or stockholder of the defendant corporation and was not authorized to sign and execute contracts. He did, however, have conferences with Milbank for the purposes of adjusting the differences between Milbank and the company.

> "The defendant first contends that the judgment is void because it is not so far engaged in doing business in this state as to be subject to the jurisdiction of its courts. The authorities, both state and federal, have found difficulty in laying down an all-embracing rule as to what constitutes 'doing business', and many instances of irreconcilable conflict have arisen. It has been held by numerous cases, however, that in order for a foreign corporation to be doing business within the state it must transact here some substantial part of its ordinary business by its agents and officers selected for that purpose. (Davenport v. Superior Court, 183 Cal. 506 [191 Pac. 911]; Walton N. Moore Dry Goods Co. v. Commercial Industrial Co., 276 Fed. 590, 594; Knapp v. Bullock Tractor Co., 242 Fed. 543.) The phrase 'doing business' is equivalent to the words 'transacting business' and has reference to a continuation in some form of business, but ordinarily does not apply where a corporation does only a single act of business within the state. (General Conference of Free Baptists v. Berkey, 156 Cal. 466 [105 Pac. 411].) There must be the carrying on of business to such an extent by the corporation as to manifest its presence in the state even though the transactions are entirely interstate in character. (International Harvester Co. v. Kentucky, 234 U. S. 579 [34 Sup. Ct. 944, 58 L. Ed. 1479, 1483].)

"Directing our attention to the activities of defendant in this state, we are of the opinion that they were sufficient in character to constitute 'doing business' for the purpose of the service of summons. The continuous endeavor to service the engines of customers in order to correct their mechanical defects and increase their efficiency was a substantial and important branch of its ordinary business. It is apparent that the maintenance of such a service does not logically fall within the catagory of a merely casual or incidental activity of defendant. Cone v. New Britain Machine Co., 20 Fed. (2d) 593, 595; Beach v. Kerr Turbine Co., 243 Fed. 706.)

The Honorable Court should also give persuasive effect to a decision of a Judge of the Southern District of California who in the case of *Knapp v. Bullock Tractor Co.* (supra), laid down this very sensible general rule:

"The general concensus of opinion is that the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose, and that the transaction of an isolated business act is not the carrying on or doing business in a state.

"Just what may be meant in that statement by the phrase 'some substantial part of its ordinary business' is perhaps indefinite; but I think, upon reason and authority, it may be said that if the corporation is engaged in a more or less continuous effort, not merely casual, sporadic, or isolated, to conduct and carry on within the state some part of the business in which it is usually and generally engaged, it may

be said with due and becoming propriety to be 'doing business' within such state. (Cases cited.)"

RULE 3.

Although it is generally held that where a foreign corporation's agent within the state merely solicits orders, and merchandise is then sent directly from out of the state to the customers direct or to the agent to be delivered to the customers, said shipment taking place after the solicitation of the orders and solely to fill the orders, that the foreign corporation is not doing business within the state.

Yet, it is uniformly held that where the foreign corporation maintains a stock of merchandise within the state not only for the purpose of filling immediate present orders exclusively, but from which stock future orders may be filled, then the foreign corporation is doing business in the state because by maintaining its stock in the state, it is transacting business within the state and is present therein, and is not merely shipping merchandise in interstate commerce.

The general rule is stated by Fletcher, as follows: (*Fletcher Cyc. Corp.,* Vol. 18, p. 398):

"Thus where a foreign corporation maintains a stock of goods on the premises of, and in charge of, a domestic warehouse company, and furnishes such company a credit list authorizing it to allow certain customers to withdraw goods on their own written orders, and the company notifies the foreign corporation of the details of its delivery of goods to customers, and the customers are billed directly from the home office of the foreign corporation, and its

activities on its behalf constitute doing business in the state by the corporation, and service of process on the warehouse company is service on the corporation, and this is so though the warehouse company functions in a similar way for others and disclaims the agency."

See also to the same effect:

Cunningham v. Mellin's Food Co. of North America, 121 Misc. 353, 201 N. Y. Supp. 17.

A most important case which is almost directly in point with our facts, is that of *Kerr Glass Manufacturing Co. v. Superior Court,* 6 Pac. Rep. (2d) 368, 166 Wash. 41:

"We shall refer to that defendant as the relator herein.

"(1) Relator is a Nevada Corporation, manufacturing fruit jars and caps, having its factory and principal office at Sand Springs, Okla. It is not qualified to do business in this state, and maintains no office, factory, warehouse, or other establishment in Washington. It is not listed in any city directory or telephone book.

"A. J. Huch, an employee of the relator, makes his home in the state of Washington, and represents relator in Western Washington, British Columbia, Alberta, Saskatchewan, and part of Manitoba, Canada. Huch agrees with relator in its contention that he is not relator's agent. He secures, but does not accept, orders for relator's products from prospective purchasers, principally wholesalers and some chain stores; such orders being subject to approval and final acceptance by relator at its home office in Oklahoma. Relator completes delivery when the

products are turned over to the transportation company in Oklahoma. Bills of lading, invoices, and statements are sent from relator direct to the buyer. Remittances are made direct from buyer to seller. Huch makes no collections, and has nothing to do with extending credit.

"Huch also calls on retailers, to whom he does not sell, and encourages the use of relator's products. Certain seasons relator sends men into the territory to help Huch in cultivating retailers. They create demands for relator's products, and pass orders along to the wholesaler designated by the retailer. These men are hired in Oklahoma, are paid from there, and report to the home office. Huch gets a copy of their reports, and directs their efforts while there.

"Huch reports daily to Oklahoma, and is paid from there. Relator keeps no bank account in this state.

"Sometimes relator, in order to secure carload rates for the buyer, completes a carload with merchandise not yet actually ordered, and this is placed in a warehouse and sold, subject to confirmation of the sales by the home office. At the time this matter was pending before the lower court, relator had such merchandise in storage in this state. Some of the goods had then been in the warehouse for three months. Sometimes the goods are kept in a warehouse in this state for more than three months. Such excess shipments are received in this state approximately two or three times a year. When goods are sold from such stored excess shipments, a requisition upon the warehouseman is filled out and pinned to the order, which is sent to the home office for approval.

"The principal question before us is whether or not under these circumstances, relator is doing business in the state of Washington."

The Court on these facts held that the foreign corporation was doing business in the State of Washington. Saying further:

"In the case before us relator kept some goods in storage in the state of Washington for the purposes of sale, keeping them for long periods as often as two or three times a year. It is true relator did not at all times keep goods in this state for purposes of sale, as was the situation in the case of Grams v. Idaho National Harvester Co., 105 Wash. 602, 178 P. 815, where it was held that the corporation there concerned was doing business in this state. It is likewise true that such goods were disposed of, like all other goods handled by Huch, by securing offers to buy, which did not constitute sales until accepted by the home office. Requisitions upon the warehouse for the goods in storage were attached to the order blanks and sent back to the office in Oklahoma.

"However, we think it can be fairly said that Huch's course of conduct, taken into consideration with the disposal of the goods shipped into this state before they were sold and held here, under the protection of the state government, awaiting sale, made manifest the presence of relator in this state. We think the conduct of Huch, in connection with that of the relator, constituted a course of business, and not a series of isolated transactions.

"True, it has been held time and again that a state cannot burden interstate commerce or pass laws which amount to the regulation of such commerce;

but this is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the state which is wholly of an interstate commerce character. * * *

"We are satisfied that the presence of a corporation within a state necessary to the service of process is shown when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state, although the business transacted may be entirely interstate in its character."

RULE 4.

Whether or not a foreign corporation was "doing business" within the state at the time of service of process is a question of fact and each case must be decided on its own facts.

St. Louis Southwestern Railway Company v. Alexander, 227 U. S. 218, 57 L. Ed. 486, (Per Mr. Justice Day):

"This Court has decided each case of this character upon the facts brought before it, and has laid down no all-embracing rule by which it may be determined what constitutes the 'doing of business by a foreign corporation in such a manner as to subject it to a given jurisdiction.'"

24 *Mich. Law Review,* 633, 639, (By Professor Maxwell E. Fead):

"The Courts have consistently refused to give any set definition as to what constitutes doing business in the state, wishing to decide each case upon its facts."

Fletcher Cyc. Corp., Vol. 17, Chap. 67, §8502, p. 555:

"It was observed earlier in this subdivision that the question of whether a foreign corporation is doing business in the state within the terms of its regulatory laws is mainly one of fact. Various acts and transactions supporting an inference, or evidencing the fact, that the foreign corporation was doing business in the state have been set forth in the preceding sections. The province of the court and jury in passing on the issue as to whether the foreign corporation is doing business in the state is the same as in jury cases generally. If the facts relating to the doing of business are undisputed and the inference to be drawn from them is so obvious as to leave no issue for the jury, the question is one of law for the court; but where the evidence upon the point is conflicting so that reasonable minds might draw different conclusions therefrom, it is for the jury under proper instructions from the court."

Citing:

Meade Fibre Co. v. Varn, 3 F. (2d) 520;

Chase Bag Co. v. Munson Steamship Line, 295 Fed. 990;

Cannon Mfg. Co. v. Cudahy Packing Co., 292 Fed. 169, aff'd 267 U. S. 333, 69 L. Ed. 634, 45 Sup. Ct. 250;

Empire Fuel Co. v. Lyons, 257 Fed. 890, certiorari denied 252 U. S. 582, 64 L. Ed. 727, 40 Sup. Ct. 393;

Hayes Wheel Co. v. American Distributing Co., 257 Fed. 881, certiorari denied 250 U. S. 672, 63 L. Ed. 1200, 40 Sup. Ct. 13;

Bellefield Co. v. Carleton Investing Co., 228 Fed. 621;

National Mercantile Co. v. Watson, 215 Fed. 929, appeal dismissed 219 Fed. 1022;
Audenried v. East Coast Milling Co., 124 Fed. 697;
Oakland Sugar Mill Co. v. Fred W. Wolf Co., 118 Fed. 239.

See also: *Fletcher Cyc. Corp.,* Vol. 17, Chap. 67, §8464, pp. 465, 466:

> "Otherwise the question is ordinarily one of judicial determination and primarily one of fact. All the combined acts of the foreign corporation in the state must be considered, and every circumstance is material which indicates a purpose on the part of the corporation to engage in some part of its regular business in the state. In consequence, it is difficult and perhaps impossible to lay down any rule of universal application to determine when a foreign corporation is doing business in a particular state within the purview of the provisions in question. Each case must turn upon its own peculiar facts and upon the language in which the applicable constitutional or statutory provision is couched."

14a *Corpus Juris*, §4154, p. 1422;
14a *Corpus Juris*, §4073, p. 1367.

(b) The Facts in This Case as Found by Both Court and Jury, Clearly Establish That Defendant Was "Doing Business" in This State at the Time When Process Was Served Upon it.

With these rules of law fresh in our minds, this Honorable Court should find no difficulty in interpreting the true facts in this case.

Let us remind the Court that the *question of fact* as to whether defendant corporation was "doing business" in California at the time of service of process, has been passed upon favorably towards retention of jurisdiction on *three different occasions,* during the pendency of this litigation.

[1] If only the evidence produced at the preliminary hearings on the motion to quash heard prior to the date of trial are considered, the record is nevertheless sufficient to sustain jurisdiction.

Immediately after having the case removed from the State to the Federal Court, defendant raised the question of jurisdiction, by way of a motion to quash summons. At that time, as well as throughout the proceedings,

> *"the burden of proof is on the corporation to defeat jurisdiction by showing that service of summons on it did not confer jurisdiction on it because it was not doing business in the state when served."*
>
> *Scene-in-Action Corporation v. Knights of Klu-Klux-Klan,* 261 Ill. App. 153, 158;
> *Wiley Electric Company v. Electric Storage Battery Company,* 167 Miss. 842, 147 So. 773 at 777.

In support of its motion to quash summons, defendant filed various affidavits, to-wit:

(1) Affidavit of Robert V. Jordan, Assistant Secretary of State of California, to the effect that the Liquid Veneer Corporation had never legally qualified to do business in California by filing Articles of Incorporation, etc., nor had it designated a statutory agent to receive service of process. (Tr., pp. 54 and 55.)

(2) Affidavit of Martin J. Cabana, Executive Vice-President of Liquid Veneer Corporation, to the effect that defendant never engaged in business in California; that it never designated anyone to accept service for it in California; that it has never filed its Articles of Incorporation, etc., with state authorities in California; that on March 1st, 1932, the date when the corporation was served by serving the Secretary of State, E. C. Mack was only a traveling salesman, working on commission for the defendant and was not authorized to accept service of summons on its behalf; that defendant shipped all merchandise direct to customers from Buffalo, except where it was necessary to redistribute goods by public warehouse forwarders "when previously bulked for freight economy on transcontinental journey." (Tr., p. 55, et seq.)

(3) Affidavit of Fred D. Morgan, Secretary and General Manager of Liquid Veneer Corporation, essentially identical with affidavit of Martin J. Cabana. (Tr., p. 58, et seq.)

Plaintiff at this point maintained that the District Court (as well as the State Court from which defendant had removed the case) properly had jurisdiction over the defendant and the subject matter of the case within the rule of law which we have carefully outlined above, namely, *that a foreign corporation is doing business within a state if it maintains a stock of merchandise within the state not only for the purpose of filling immediate present orders exclusively, but from which stock of merchandise future orders may be filled, because in maintaining its stock of merchandise in the state, the foreign*

corporation is transacting business within the state and is present therein and is not merely shipping merchandise in interstate commerce.

Consistent with this principle, therefore, plaintiff filed two affidavits in opposition to the affidavits of the moving party, namely, as follows:

(1) Her own affidavit dated May 17th, 1932, to the effect that she personally saw a stock of merchandise belonging to the defendant Liquid Veneer Corporation at the premises of the Hazlett Warehouse Company, formerly known as the Lawrence Warehouse Company at 285 Brannan Street, San Francisco; that she saw orders in the possession of said Hazlett Warehouse Company executed by the Liquid Veneer Corporation ordering said warehouse company to ship merchandise out of the stock on hand to various concerns in the State of California; that E. C. Mack, the defendant's representative, has called on her numerous times as agent for the defendant and had endeavored to adjust differences that have arisen between her and the company and that innumerable orders for the merchandise of the defendant orderd by concerns in Los Angeles were filled from the above mentioned stock in San Francisco. (Tr., p. 61.)

(2) The affidavit of Elijah M. Smuckler (plaintiff's son and since deceased) in effect as follows:

> "that his investigation showed that the defendant herein keeps goods, wares and merchandise stored with a public warehouse in the City of San Francisco known as the Haslett Warehouse Co., formerly the Lawrence Warehouse Company, at its warehouse No. 19, located at 285 Brannan Street, San Fran-

cisco, California; that said Haslett Warehouse Co., formerly Lawrence Warehouse Company, is a public warehouse and that said goods, wares and merchandise belonging to the defendant herein are held at said warehouse subject to the order of the defendant herein; that said merchandise is shipped out on orders received by the defendant herein subsequent to the time that said merchandise is placed in said warehouse." (Tr., p. 62.)

Defendant then filed in reply to these two affidavits the following further affidavits:

(1) Affidavit of E. C. Mack, essentially as follows:

"That he is now and for some time has been a traveling salesman, his territory comprising the Pacific Coast area, which includes the States of Washington, Oregon, Nevada, Montana, Idaho and Northern California. That his duties are confined entirely to soliciting, within said territory, orders for the manufactured products of Liquid Veneer Corporation, of the City of Buffalo, State of New York, defendant above named, said orders being forwarded for acceptance by the said corporation at its Home Office in the City of Buffalo. That no sales are or have been made by affiant of any of defendant's goods, wares or merchandise within the State of California, affiant merely soliciting orders for defendants manufactured products, which orders, as aforesaid, are transmitted to defendants at its home office in the City of Buffalo for acceptance.

"Deponent further states that he never called upon Lena G. Smuckler for the purpose of selling her any goods, wares or merchandise of the defendant corporation; that deponent has never had any con-

versations with Lena G. Smuckler in any representative capacity or under any authorization of the defendant corporation." (Tr., pp. 63 and 64.)

(2) The further affidavit of Fred G. Morgan which refers to the affidavit of plaintiff and substantially affirms the affidavit of E. C. Mack. (Tr., pp. 64 and 65.)

The matter was submitted and an order which was inadvertently entered granting the motion to quash, was on December 12th, 1932, vacated and briefs were ordered filed (Tr., p. 66.)

While this motion was still under advisement, plaintiff moved to reopen the matter for the purpose of presenting oral and documentary evidence in further opposition to the motion of defendant. Plaintiff's request was granted and on May 13th, 1933, further proceedings took place, as follows:

(1) Robert H. Breckenridge was called as a witness for the plaintiff. Defendant objected to his testimony upon the ground that he was not within the motion or the order reopening the proceedings upon the motion to quash, for the reason that said notice simply named Miss E. Kaster, Mr. W. E. Max and Mr. E. C. Mack. (Tr., p. 69.)

This same objection is now again referred to by defendant as one of the assigned errors. (App. Br., pp. 99-100.)

We know of no law—nor has defendant cited any—which delimits a motion to reopen proceedings to the identical witnesses named in the motion to reopen. It

was not necessary that any witnesses be named in the motion; in the absence of a showing of surprise or fraud, it certainly is within the sound discretion of the trial judge to proceed with a motion to reopen proceedings as he sees fit. Be that as it may, an order was specifically made at the end of this hearing of May 13th, 1933, continuing the hearing to May 29th, 1933, for the obvious purpose of permitting the defendant to produce further testimony which it actually did in the form of two additional affidavits. (Tr., p. 82, et seq.) Defendant's objection, therefore, certainly comes with little grace and questionable sincerity in view of this order.

Returning now to the testimony, Mr. Breckenridge testified that he was Assistant Controller for the May Company, a large department store in the City of Los Angeles; that he is in charge of its records, and that he has brought with him certain records relating to transactions between the May Company and the defendant corporation.

After being properly identified, there were then received in evidence photostatic copies of invoices, as follows:

Plaintiff's Exhibit 1, invoice of Liquid Veneer Corporation, dated July 7th, 1932, showing sale to May Company of a certain quantity of Liquid Veneer products to be shipped by Wabash and Santa Fe Railway systems and indicating at the bottom of the invoice "Balance of order shipped from warehouse." [We remember, of course, that it was uncontradicted that defendant maintained a warehouse in San Francisco.] (See Exhibit 1, Tr., opposite p. 69.)

Mr. Breckenridge then testified that the balance of this order recited in Exhibit 1, was actually received from the warehouse in San Francisco several days later. As is indicated by plaintiff's Exhibit 2 (Tr., opposite p. 70) which recites "shipped from warehouse at San Francisco, California" via Pacific Steamship Company.

Further, to verify this shipment from San Francisco, plaintiff introduced as Exhibit 3 (Tr., opposite p. 70), the freight bill showing shipment of this same merchandise from Lawrence Warehouse Company at San Francisco via Pacific Steamship Company and in Los Angeles via Pacific Electric Railway Company.

Still, another invoice (Plaintiff's Exhibit 4, Tr., opposite p. 70) dated April 13th, 1932, stated "balance of order shipped from warehouse", and the actual balance of the order was delivered to the May Company from the San Francisco warehouse on April 18th, 1932, via Pacific Steamship Company on an invoice for the balance dated April 15th, 1932, and on a freight bill dated April 15th, 1932. (Tr., opposite p. 71.)

This same type of transaction was emphasized by plaintiff's Exhibit 7 and Exhibit 8 (Tr., opposite p. 71), or as Mr. Breckenridge summarizes the situation:

> "To sum it up all of the invoices were received from Buffalo, New York, and some of the goods filling the invoices were received from Buffalo and some from San Francisco.
>
> "I made no search of our records in back of the dates of these documents and do not know whether there are any similar invoices older than the oldest date of these invoices. May Company has been deal-

ing with the Liquid Veneer Corporation for a matter of about 5 or 8 years. There has been no change in the general method of transacting business with Liquid Veneer Corporation on the part of the May Company." (Tr., pp. 71 and 72.)

(2) The next witness called for plaintiff was Mr. Karl S. Nance, an Assistant in the auditing department of Young's Market Company of Los Angeles. He identified two invoices of Liquid Veneer Corporation. One was dated April 30th, 1930, at Buffalo, New York, about which the witness stated: "The merchandise described therein was received from the warehouse at San Francisco, on May 1, 1930." (Plaintiff's Exhibit 9, Tr., opposite p. 72.) The second invoice was dated March 20th, 1931, and was received from Liquid Veneer Corporation at Buffalo, New York, and the merchandise was shipped from the warehouse at San Francisco and received in Los Angeles on *March 17th, 1931.* (Plaintiff's Exhibit 10, Tr., opposite p. 73.) Two freight bills were introduced to show the actual shipments from San Francisco to Los Angeles on these invoices. (Plaintiff's Exhibit 11, and Exhibit 12, Tr., opposite p. 73.)

(3) The third witness called by plaintiff was Miss Emma M. Kaster, employed at the May Company as a demonstrator for Liquid Veneer Corporation and obviously a hostile witness to plaintiff. Miss Kaster testified as far as this issue is concerned, in substance as follows:

"I work under the supervision of Mr. Max, buyer for The May Company, and Mr. Gallivan, of the

Liquid Veneer Corporation, who is in Buffalo, New York. I know E. C. Mack, an employee of Liquid Veneer Corporation, as he hired me. I do not know his address. All I know is that he is connected with the Liquid Veneer, I believe as District Manager. When he comes into the store I have no conversation with him with respect to my duties as demonstrator. Our talk is along a business line of, 'How is business?' 'Selling much?' Just ordinary business conversation takes place. I do not know that he has his headquarters in San Francisco. That is his home. I am paid a straight salary, and commissions if I sell a certain amount, but I have not been selling that much so I do not get any commissions. When we run short of merchandise at the May Company I go to Mr. Max and ask him for an order and the girls in the office write it up. Goods are received as I need it. I do not know where it comes from. I have been at the May Company for 12 years. I first started working for the Liquid Veneer Corporation 7 or 8 years ago." (Tr., p. 74.)

(4) The plaintiff then testified (Tr., p. 76). In the main, she repeated what she had stated in her affidavit originally filed in opposition to defendant's motion to quash when it was first made (Tr., p. 61), namely, to the effect that in the early part of 1932 (just before this suit was filed) she went to the Lawrence Warehouse Company in San Francisco, that she saw merchandise marked "Liquid Veneer" and bills made out to California concerns to whom the merchandise was being shipped.

"I had been a demonstrator in the May Company and the carton in which the merchandise of the

> Liquid Veneer Corporation is brought up to the demonstrating floor was similar in character to the cartons I saw in the warehouse. I had a conversation with the bookkeeper at the warehouse." (Tr., p. 76.)

That she had a conversation with the bookkeeper there who told her that customers could come there and purchase Liquid Veneer and have it shipped to them; that "they have agents here to take orders and ship it direct from the warehouse"; and that "Mr. Mack himself brought all his orders to have them shipped" and that she could purchase Liquid Veneer from them and have it shipped from the warehouse to her address." On further examination by the Court, plaintiff described in detail the warehouse where she saw the Liquid Veneer products, whom she spoke to, etc. (Tr., pp. 78 and 79.)

On cross-examination by counsel for the defendant, besides repeating her testimony, plaintiff added:

> "My best recollection of the time is not that it was in January or February, 1931 or 1932 * * * it was either in 1930 or 1931. I just don't remember. I could look it up, I didn't think to look it up.
>
> Q. 1930 or 1931?
>
> A. Yes. I can't tell you—I couldn't say to that. I wouldn't want to say because I just don't remember.
>
> Q. You were at that time engaged in gathering information as to whether they were doing business in California or not?
>
> A. Yes, sir.

Q. Well, the question of their doing business in California had not arisen at that time, had it?

A. Yes, sir.

Q. Your action was not brought until March, 1932, was it?

A. Well, I was gathering information for it, however, because they had been bothering my sales; they had been bothering my customers, my sales." (Tr., pp. 80 and 81.)

The hearing was continued to May 29th, 1933, so as to give defendants an opportunity to produce additional testimony. On May 29th, 1933, defendant did file two additional affidavits, to-wit:

(1) The affidavit of Thomas B. Healey, to the effect that he is an officer of Liquid Veneer Corporation, he is familiar with the methods of shipping merchandise, and that in shipping merchandise to the West Coast it is often stored in a public warehouse in San Francisco so as to ship in larger bulk and save freight costs instead of shipping in smaller lots to fill each individual order as it comes into Buffalo; and that all of the business of the defendant is transacted directly from Buffalo. (Tr., pp. 82, 83 and 84.)

(2) The affidavit of Martin J. Cabana, Vice-President in charge of sales of Liquid Veneer Corporation, in which affidavit he (a) repeated in substance the subject matter of Mr. Healey's affidavit; and (b) denied in substance the affidavit and oral testimony of the plaintiff. (Tr., pp. 85, 86 and 87.)

The matter was then submitted and some time later, to-wit, October 7th, 1933, the District Court entered the following order:

> "The oral evidence taken is sufficient, being uncontradicted, to show that the defendant was doing business in California.
>
> "Motion to quash is denied with right to defendant to renew the same at the trial. Exception to defendant." (Tr., p. 87.)

It should be clear by now that even at this preliminary stage the record amply upholds the jurisdiction which the trial court assumed.

We have seen also that the law clearly holds a foreign corporation to be doing business within a state *if it warehouses merchandise within the state not only for purpose of filling existing orders already taken, but in order to have a supply on hand from which to fill orders to be taken in the future.*

Defendant complains bitterly of the type of evidence upon which plaintiff relies: In the first place as we have already seen, the burden of proof was on the defendant as the moving party. It was clearly up to the defendant to prove that it was not doing business in California at the time of service. *What type of evidence did defendant choose to rely on?* The rankest type of evidence namely, ex parte affidavits giving plaintiff no opportunity whatever for cross-examination. Plaintiff on the other hand went beyond the point legally necessary. *She produced oral and documentary evidence.* The photostatic copies of the invoices, bills of lading and freight receipts speak for themselves. They indicate beyond question:

(1) That although the invoices were dated at Buffalo, New York, they were filled in whole or in part from the stock kept at the Lawrence Warehouse Company in San Francisco.

(2) The dates of shipment from San Francisco to Los Angeles when compared with the dates appearing upon the orders as received in Buffalo, *establish conclusively that the merchandise was not shipped from Buffalo to San Francisco and then temporarily warehoused and from there reshipped to Los Angeles so as to fill the given order, but that the orders were actually and immediately filled from the stock of merchandise continually kept on hand in San Francisco.* The invoice dated July 7th, 1932, at Buffalo, showing it to be shipped by Wabash and Santa Fe Railways was actually shipped from the San Francisco warehouse on July 12th, 1932. The invoice dated April 13th, 1932, at Buffalo, New York, and to be shipped via Wabash and Santa Fe actually left the San Francisco warehouse April 15th, 1932; the invoice dated Buffalo, April 30th, 1932, stated on its face that it was going via Pacific Steamship Company but was actually shipped via Pacific Steamship Company from San Francisco the very next day, May 1st, 1932.

This evidence alone is so conclusively sufficient to show that the orders were filled from a standing stock of merchandise in San Francisco, even if we completely eliminate the oral testimony of plaintiff and Miss Kaster, that it comes with little grace from defendant to complain because the District Court denied the motion to quash because he felt that the "oral evidence taken is sufficient,

being uncontradicted to show that the defendant was doing business in California."

The ex parte affidavits of defendant's employees in the face of this uncontradicted documentary evidence was given exactly the credence which it deserved—apparently none.

(2) Defendant's renewed motion to dismiss for alleged lack of jurisdiction made at the beginning and during later stages of the trial was based on more affidavits which added nothing to what had already been heard and passed upon by the trial judge in the preliminary hearing.

On the day of trial, May 7th, 1935, defendant renewed its motion to quash service of summons and to dismiss on the same grounds that it had previously urged. (Tr., pp. 88 to 91.) In support of this motion, there were filed all of the affidavits which defendant had previously filed at the earlier hearings (Tr., pp. 90 and 91), and in addition, six more affidavits, five of them by employees of the Haslett Warehouse Company of San Francisco, formerly known as the Lawrence Warehouse Company, and the sixth, another affidavit by Martin J. Cabana. The general import of all of these affidavits was to attempt to discredit the testimony of plaintiff given at the earlier hearing and to further indicate defendant's method of doing business so as to show that the warehousing done at San Francisco was only for the purpose of breaking up interstate shipments in transit. (Tr., pp. 92 to 124.)

The Court denied the renewed motion. (Tr., p. 125.)

It would seem strange that with so much at stake, with San Francisco only a few hours away, and with apparently

ample funds at its disposal, defendant still relied entirely upon ex parte affidavits in its attempt to establish that it was not doing business in California in 1932. *The reason that not a single signer of these five additional affidavits of San Francisco employees of the warehouse company were present in Court will become plain later. Suffice it to say that these affidavits were proved to be false and misleading at least in part by subsequent retractions which some of these affiants later made.*

At this point, the documentary evidence which plaintiff had previously produced and which was now expressly made a part of the record at the actual trial (Tr., pp. 205 and 206) still remain the more reliable and convincing evidence. It is submitted that there was little else which the trial judge could properly do except to overrule their renewed motion which he promptly did, and to order that the case be tried on its merits, leaving open the question of no jurisdiction if the evidence during the trial showed that defendant was not actually doing business in California at the time of service of process.

(3) After the jury returned a verdict in favor of plaintiff, the defendant filed at the same time as it filed a motion for new trial, a new motion to dismiss because of lack of jurisdiction.

Now we reach a stage of this case where defendant's position is made to appear very strange to put it charitably.

The verdict was returned on May 9th, 1935. On May 10th, 1935, a judgment in conformity with the verdict was entered and docketed.

On July 9th, 1935, defendant served and filed:

[a] A motion to set aside the verdict and for new trial; and

[b] A motion to dismiss.

The motion to dismiss (as well as the motion for new trial) was made upon the ground of lack of jurisdiction at the time of service of process because (a) the Secretary of State had been improperly served (this is the first time that this point is specifically urged by defendant—after trial and entry of judgment); and (b) defendant was not doing business in this state at the time of service of process. (Tr., pp. 220 and 221.)

Defendant's motion was expressly based "upon the records, files, affidavits and evidence in this proceeding" and upon a new affidavit therewith filed, namely, that of Robert V. Jordan, dated June 17th, 1935 (Tr., pp. 221, 222 and 223).

The matter was continued to July 29th, 1935, in order to give plaintiff an opportunity to reply to defendant's motion.

At this point, present counsel for plaintiff for reasons which need not be specifically herein stated determined once and for all to independently check the numerous affidavits which defendant had filed in connection with its alleged methods of doing business in California.

The result of this investigation was truly astounding. Complete retractions were made by two of the affiants who had previously filed affidavits on behalf of the defendant and who would now voluntarily file repudiatory affidavits. Further, although John Brash and J. W.

Howell do not in so many words state that they perjured themselves when they made their earlier affidavits which were filed by defendant in its behalf, an examination of the two sets of affidavits can lead to no other conclusion.

[1] In his second affidavit, John Brash said in substance that for ten years he had been superintendent of Lawrence Warehouse Company in San Francisco, now known as the Haslett Warehouse Company:

> "That affiant knows and at all times herein mentioned has known of business concern, Liquid Veneer Corporation of Buffalo, N. Y., and that during all of said time up to and until May 4, 1932, said Liquid Veneer Corporation has maintained an account with said warehouse companies and maintained a stock of merchandise therewith:
>
> "That on or about May 4, 1932, said account and merchandise was transferred to the G. A. Hosmer Co. in which last mentioned name account has remained, until April 18, 1935, at which time the said G. A. Hosmer Co. instructed said Haslett Warehouse Co. to ship all of its Liquid Veneer Products merchandise out of the state temporarily.
>
> "That at all times herein mentioned, said Liquid Veneer Corporation and for G. A. Hosmer Co. has maintained with said Lawrence Warehouse Co. and said Haslett Warehouse Co. as the case may be, a stock of merchandise, which would be stored in said warehouses until,
>
> "1—Orders were received to fill any order sent in by said Liquid Veneer Corporation or said G. A. Hosmer Co.
>
> "2—Local customers, which were on the accredited list of said Liquid Veneer Corporation or G. A.

Hosmer Co. would call said warehouse companies and request various amounts of such merchandise to be delivered without direct order from Liquid Veneer Corporation after which the said warehouse companies would inform the said Liquid Veneer Corporation or G. A. Hosmer Co. as the case may be of the request for and delivery of such merchandise, to said accredited customers.

"That a certain amount of such merchandise was always kept on hand at said warehouses for the purpose of securing the warehouseman's lien for storage thereof and services rendered to its said customers herein above referred to and for the purpose of filling future orders.

"That said Liquid Veneer Corporation or G. A. Hosmer Co. would ship to said warehouses carload quantities of its merchandise, which was stored until sold, which took from one month to two years or more to-wit:

"1—On September 8, 1931, there was on hand in said warehouse 2 cases of 12 gross each of such merchandise from a particular shipment which was disposed of by orders at various times and dates up to and until May 18, 1935.

"2—On February 3, 1930, said warehouse had on hand 23 cases and 14 dozen of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and dates up to May 1, 1932. When balance of said merchandise was ordered shipped out on order of G. A. Hosmer Co.

"3—On January 16, 1932, said warehouse had on hand 11 cases of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and dates up to

March 12, 1934, at which time there was left of said lot or shipment of merchandise 7 cases thereof and on January 24, 1935, said 7 cases were delivered on order of G. A. Hosmer Co. That such statements of shipments and the dates and methods of delivery of said merchandise are taken from the permanent records of said warehouses which are too numerous to set forth herein, all of which are typical of said records herein above set forth and which reflect the method or methods of handling, delivering or storing the merchandise of said Liquid Veneer Corporation.

"That on May 4, 1932, the said Haslett Warehouse Co. received a letter dated April 30, 1932, from the Liquid Veneer Corporation instructing said warehouse Company to transfer all merchandise and records to the account of G. A. Hosmer Co. effective as of February 1, 1932, and make all future shipments and bills for the account of G. A. Hosmer Co.

"That no merchandise was ever received from said Liquid Veneer Corporation or G. A. Hosmer Co. on consignment basis, but was at all times received for storage to be held until such time as future sale orders were received for same which in some instances such orders were not received for as long as 2 years thereafter.

"That the foregoing is a true statement of the method or methods used by the Lawrence Warehouse Co. #19, now known as the Humboldt Warehouse of the Haslett Warehouse Co. in receiving, handling, storing and shipping the merchandise of the said Liquid Veneer Corporation and G. A. Hosmer Co.

"This affidavit is given pursuant to a subpoena and subpoena duces *taken* and issued July 13, 1935,

in the above entitled matter and served upon the said Haslett Warehouse Co." (Tr., pp. 226, 227 and 228.)

[2] In his second affidavit, J. W. Howell states in substance that he has for many years been secretary of the Lawrence Warehouse Company now known as the Haslett Warehouse Co. in San Francisco and:

"That at the time the Haslett Company took over said warehouse John (Jack) Brash was the superintendent in charge, W. G. Heiss was in charge of the office and the clerical work and records and George Savage was employed in various capacities and as a substitute for Mr. Heiss in case of his absence from the office; that said named persons were continued in their several capacities as employees of the Haslett Warehouse Company and all except Savage have ever since maintained their respective positions.

* * * *

"That affiant knows, and at all times herein mentioned has known of the business concern, Liquid Veneer Corporation of Buffalo, New York, and that during all of said time up to and until May 4th, 1932, said Liquid Veneer Corporation has maintained an account with said warehouse companies and maintained a stock of merchandise therewith.

"That on or about May 4th, 1932, said account and merchandise was transferred as of February 1st, 1932, to the G. A. Hosmer Co. in which last mentioned name account has remained, until April 18th, 1935, at which time said G. A. Hosmer Co. instructed said Haslett Warehouse Co. to ship all of its Liquid Veneer products merchandise out of the state.

"That at all times herein mentioned, said Liquid Veneer Corporation or G. A. Hosmer Co. has maintained with said Lawrence Warehouse Company and said Haslett Warehouse Co. as the case may be, a stock of merchandise which would be stored in said warehouses until:

"(1) Orders were received to fill any order sent in by said Liquid Veneer Corporation or said G. A. Hosmer Co.

"(2) Local customers, which were on the accredited list of said Liquid Veneer Corporation or G. A. Hosmer Co. would call said warehouse companies and request various amounts of such merchandise to be delivered without direct order from Liquid Veneer Corporation after which the said warehouse companies would inform the said Liquid Veneer Corporation or G. A. Hosmer Co. as the case may be of the request for and delivery of such merchandise, to said accredited customers.

"That said Liquid Veneer Corporation or G. A. Hosmer Co. would ship to said warehouses carload quantities of its merchandise, part of which was stored until sold, which took from one month to two years or more, to-wit:

"(1) On September 8th, 1931, there was on hand in said warehouse 2 cases of 12 gross each of such merchandise from a particular shipment which was disposed of by orders at various times and dates up to and until May 18th, 1935.

"(2) On February 3rd, 1930, said warehouse had on hand 23 cases and 14 dozen of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and date up to May 1st, 1932, when balance of said

merchandise was ordered shipped out on order of G. A. Hosmer Co.

"(3) On January 16th, 1932, said warehouse had on hand 11 cases of merchandise from a particular shipment of said Liquid Veneer Corporation which was afterwards sold at various times and dates up to March 12th, 1934, at which time there was left of said lot or shipment of merchandise 7 cases thereof and on January 24th, 1935, said 7 cases were delivered on order of G. A. Hosmer Co. That such statements of shipments and the date and methods of delivery of said merchandise are taken from the permanent records of said warehouses which are too numerous to set forth herein, all of which are typical of said records hereinabove set forth and which reflect the method or methods of handling, delivering or storing the merchandise of said Liquid Veneer Corporation.

"That on May 4th, 1932, the said Haslett Warehouse Company received a letter dated April 30th, 1932, from the Liquid Veneer Corporation instructing said warehouse Company *received a letter dated April 30th, 1932, from the Liquid Veneer Corporation instructing said warehouse company* to transfer all merchandise and records to the account of G. A. Hosmer Co. Effective as of February 1st, 1932, and make all future shipments and bills for the account of G. A. Hosmer Co.

"That no merchandise was ever received from said Liquid Veneer Corporation or G. A. Hosmer Co. on consignment basis, but was at all times received for storage to be held until such time as future sale orders were received for same which in some instances such orders were not received for as long as 2 years thereafter.

"That affiant personally knows and has examined all of the records of the Lawrence Warehouse Company which conducted the warehousing of the Liquid Veneer merchandise up to the time that the Haslett Warehouse Company took over the Lawrence Warehouse Number 19 and that affiant knows that these records which are too cumbersome and numerous to attach to this affidavit fully reflect the statements therein made.

"That the foregoing is a true statement of the method or methods used by the Lawrence Warehouse Company Number 19, now known as the Humboldt Warehouse of the Haslett Warehouse Co. in receiving, handling, storing and shipping and merchandise of the said Liquid Veneer Corporation and G. A. Hosmer Co.

"This affidavit is given pursuant to a subpoena and subpoena duces tecum issued July 13th, 1935, in the above entitled matter and served upon the said Haslett Warehouse Co." (Tr., pp. 235, 236, 237, 238 and 239.)

These two affidavits completely repudiate all of the affidavits which defendant had filed in its behalf at the time it urged the motion to dismiss.

[3] But in addition, at the same time, plaintiff filed an affidavit of Isador I. Smuckler, one of the attorneys of record for plaintiff. Although the affidavit is hearsay, it is the type of evidence to which defendant has exclusively resorted. Without setting out the affidavit hereat, the attention of this Honorable Court is referred to it as it appears in the Transcript at page 231, et seq.

The statements therein made are entitled to credence because they are backed up by the supporting affidavits of John Brash and J. W. Howell.

In addition, at the same time, plaintiff filed the affidavit of Byron Jack Badham, Jr. (Tr., p. 229), purchasing agent for Hoffman Hardware Company of Los Angeles, for the past ten years, who said:

> "That in his capacity as purchasing agent, he is intimately acquainted with the merchandising methods of Hoffman Hardware Company. That Hoffman Hardware Company has for many years last past, including the past six (6) years, bought merchandise from the Liquid Veneer Corporation of Buffalo, New York. That affiant personally knows E. C. Mack who is the Pacific Coast representative of the Liquid Veneer Corporation and that he has dealt with said E. C. Mack for the past six (6) years. That during these years and with particular reference to the years 1931 and 1932 said E. C. Mack would visit the Hoffman Hardware Company regularly on the average of every two (2) or three (3) months. That during said times said E. C. Mack on behalf of the Liquid Veneer Corporation would solicit business for the Liquid Veneer Corporation and would endeavor to sell Hoffman Hardware Company increased quantities of the various Liquid Veneer products. That the said Hoffman Hardware Company would look to said E. C. Mack as the person with whom all matters relating to Liquid Veneer Corporation could on numerous occasions be discussed and straightened out. That generally all orders of Liquid Veneer products would be mailed directly to Lawrence Warehouse #19, in San

Francisco, California, now known as the Humbolt warehouse of the Haslett Warehouse Company, or to the said E. C. Mack, at his San Francisco, California address, and shortly thereafter, generally within three (3) or four (4) days, the said orders were filled from the Liquid Veneer Corporation's stock of merchandise left at the Lawrence Warehouse (since 1932 known as the Haslett Warehouse) in San Francisco, California. Rarely were the orders either sent directly to Buffalo, New York, or filled from merchandise sent from Buffalo, New York, for the express purpose of filling the orders; and never was it necessary as a matter of policy for any orders first to be approved by the home office of the said Liquid Veneer Corporation at Buffalo, New York, before the said would be filled from merchandise on hand at the Warehouse in San Francisco, California, which warehouse was always designated on the invoices of the Liquid Veneer Corporation as 'Our Warehouse at San Francisco.'

"Affiant further states that the invoices attached to this affidavit are of the original records of the Hoffman Hardware Company and correctly indicate that during all of the years the Hoffman Hardware Company did business with Liquid Veneer Corporation, the orders were filled from the designated Liquid Veneer Corporation's warehouse at San Francisco, California." (Tr., pp. 229 and 230.)

Attached to this affidavit and giving it probative value are photostatic copies of original invoices demonstrating undeniably that all of the company's orders of Liquid Veneer merchandise were regularly and continuously filled from the regular stock of merchandise which the

defendant kept on hand at their San Francisco warehouse. (See Exhibits, Tr., opposite p. 230.)

When the true situation became plain, defendant in a desperate effort to have these affidavits stricken from the record, resorted to the ingenious device of *withdrawing its motion to dismiss which it had so persistently pressed for three years.* (Tr., p. 239.)

The Court granted this request to withdraw defendant's motion to dismiss but properly held that the affidavits filed by plaintiff were nevertheless competent concerning the question of defendant doing business in California and so refused to strike them from the files.

Defendant now strongly urges that these later affidavits which showed its own affidavits to be untruthful must not now be considered by this Honorable Court in determining whether or not the District Court properly exercised jurisdiction.

Our sense of justice should be rightfully outraged at such sophistry.

But regardless, defendant has itself told us in strong language that "jurisdiction over the parties must affirmatively appear in the record proper * * * and the question as to its existence may be raised at any time." (App. Br., p. 93.) True, and for that reason this Honorable Court should examine all of the evidence which is part of the record in whatever stage of the proceedings it may have been received. Be that as it may, the situation now most clearly establishes the truth of the testimony of plaintiff throughout the trial, namely, that the defendant at the time of the filing of the complaint and of the service of the summons *was doing business in the State of*

California within the principles of law which permit a personal judgment to be rendered against a foreign corporation so carrying on business in California. The record now discloses clearly and adequately without any truthful contradiction, the following state of facts in so far as the Liquid Veneer Corporation's activities in California are concerned.

[1] Liquid Veneer Corporation has sold its full line of products in California for many years past. (Testimony of William Max of the May Company and testimony of Ben L. Strauss of the May Company and testimony of Mr. Waddington, formerly of Young's Market Company, affidavit of John Brash and affidavit of B. J. Bedham, Jr., of the Hoffman Hardware Company.)

[2] Liquid Veneer Corporation maintained a Pacific Coast representative in California, whose residence was in San Francisco and who solicited business for the Liquid Veneer Corporation from all of its many California customers, and who regularly, although periodically, visited these California customers and who was the California contact man for the Liquid Veneer Corporation.

[3] Practically all of the orders for Liquid Veneer products were filled from the warehouse at San Francisco, California, where a stock of Liquid Veneer products was permanently kept on hand, and which warehouse the defendant called "Our warehouse in San Francisco," and which orders were directly filled from the California stock without the orders being first approved by the Home Office of the Liquid Veneer Corporation at Buffalo, New York. (Testimony of Robert H. Breckenridge of the

May Company at the hearing on the motion to quash held on May 13th, 1933, and exhibits filed at that time and re-filed at the time of the trial, May 8th, 1935; affidavit of B. J. Bedham, Jr., of the Hoffman Hardware Company of Los Angeles, California; affidavit of John Brash, superintendent of the Haslett Warehouse Company of San Francisco, California, and affidavit of J. H. Howell, secretary of the Haslett Warehouse Company of San Francisco, California.

Keeping the facts of our case clearly in mind—and we submit it makes no difference whether all of the evidence in this regard is considered or only part of it—and applying to them the undisputable rules of law declared by the numerous cases which we have cited above, we can reach no other conclusion but that Liquid Veneer Corporation in spite of its ingenious scheme to avoid amenability to the laws of the State of California where it was carrying on a substantial business on a large scale, nevertheless was as a matter of law subject to be sued in this state.

IV.
THERE ARE NO PREJUDICIAL ERRORS IN THE RECORD

A. The Pleadings Are Adequate

Defendant feels aggrieved because of alleged weakness in the pleadings:

It charges that the complaint does not state a cause of action.

(a) First, because it does not state that the defendant was doing business in the State of California.

Admitting solely for the sake of argument that such an allegation is a necessary part of the complaint, there are three complete answers:

(1) Plaintiff's request to have the complaint amended in this respect, was granted by the trial court. (Tr., p. 130.) If this was a defect, the amendment cured it as of the date of the filing of the complaint. There can be no dispute that an amendment to the pleadings to conform to the proof is entirely proper and that the amended pleading takes effect as if filed as the original pleading.

21 *Cal. Jur.* 177, 185, 197, 198, 207, 212 and 213;
Chatham v. Mansfield, 1 Cal. App. 298, 82 Pac. 343.

(2) In the second place, the question of whether defendant was "doing business" in California, had been an issue between the parties for more than three years; defendant knew at all times that this was part of plaintiff's cause of action, and so could not have been in any way damaged or surprised by the plaintiff being permitted to amend her complaint to conform to the proofs; and

(3) In the third place, no special demurrer was filed by defendant and the matter was never brought up during this three year period elapsing from the filing of the complaint to the day of the trial, as the trial judge very properly remarked:

> "The Court: Proceed in the manner indicated and your Motion is denied; that is I will decline to hear it at this time because, out of all fairness to the Court, such a motion should have been presented a long time ago if there was any intention on the part of the defendant to present any such question as that.
>
> "Sheehan: Well, of course we intended to but we thought we could present it on the opening of the trial.
>
> "The Court: Proceed." (Tr., p. 128.)

(b) Secondly, because it did not allege that the libelous letter was written "of and concerning the plaintiff."

Here again, assuming for the sake of argument that such an allegation was necessary (and parenthetically it may be said that it is plain that no such allegation was necessary, it being clearly a question for the jury to determine), plaintiff requested to be allowed to amend her complaint so as to state this allegation. This amendment was permitted. (Tr., p. 38.)

Defendant's naivete crops up again in this connection. It complains bitterly because plaintiff was allowed to amend her complaint in two particulars to conform to the proofs; *yet defendant was itself permitted to amend its answer and to set up a special defense which it is now*

urging on appeal, namely that the communication from defendant to its customers in which it libeled plaintiff, was privileged.

Reason exits and sophistry enters when it is urged as defendant does that the same thing becomes a "good" when affecting defendant and a "bad" when affecting plaintiff.

B. The Proof Amply Sustains the Judgment

[1] *The letter set out in the complaint was clearly libelous per se.*

The merits of plaintiff's case on the evidence is most convincingly demonstrated by the fact that out of a 224 page brief, *defendant finds no place to discuss the question of whether the verdict is supported by the evidence.*

Obviously, this is so clear that even capable and ingenious counsel for the defendant could find nothing to say on this score.

But plaintiff will be pardoned for referring somewhat to the evidence for she feels that *this case will go down in the annals as one of the most vicious examples of a planned and malicious program of destruction by a large influential business concern of a weak competitor who because she had a good product and worked hard was able to corner for herself a tiny share of the business which defendant could not bear to see taken from it by honest means.*

Plaintiff's case is practically uncontradicted.

Being uncontradicted, having been so found by the jury, and not even being discussed by counsel in their elaborate brief for defendant, we start off with the proved

fact that plaintiff was libeled by a letter written of and concerning her by the defendant with intent to injure her in her business.

For the convenience of the Court, the letter is reprinted hereat:

"June 2, 1931.

"Young's Market,
7th Street,
Los Angeles, California.

ATTEF. General Manager

"Gentlemen:—

"Our inspector reports your selling and offering for sale a product called 'French Veneer', this is to inform you that our attorneys have advised us this is a flagrant violation of our trademark 'Liquid Veneer' as well as our common law rights.

"We recently found this product on sale at the May Company. We have explained our position to the May Company and they have taken the product off sale and have promised that they will no longer sell it. You perhaps know, or you can ascertain from any patent attorney, that the sale of an infringing product by a dealer or jobber, is looked upon in the United States District Courts as contributory infringing, and such dealer or jobber is equally liable with the manufacturer of the product.

"We have had more or less difficulty with these people who manufacture this so-called 'French Veneer', have tried to purchase evidence against them individually, but they moved around from one place to another, denied their identity when we did catch up with them and after investigating them found their financial condition such as would not warrant litigation.

"It is a different matter, however, where we find a responsible house, like yourselves, handling an infringing product, because at the end of a law suit we will be able to collect damages as well as secure a permanent injunction restraining you from ever again selling or offering for sale said infringing goods.

"When a manufacturer induces you to sell his infringing product, he is selling you a lawsuit. We are not in business to sue people, we much prefer doing them a favor, but you will see that we are only endeavoring to protect our property, just as you or anyone would do if in our position. We therefore request that you immediately discontinue the sale of this infringing product and advise us to that effect promptly.

"The manufacturer of this product if desirous of building a business rightfully his own, could easily choose many names without taking part of a name belonging to someone else, who has spent a fortune in building up their business under that name.

"His object for adopting the name 'French Veneer' is obvious. He is trying to trade on our rights. We have evidence now of the innocent housewife purchasing 'French Veneer' which she had been using for years. This housewife on finding that she had purchased the wrong Veneer returned it to the May Company and received the proper genuine 'Liquid Veneer'.

"We will await your prompt reply, and remain, meanwhile,

"Yours very truly,

"LIQUID VENEER CORPORATION

"MARTIN J. CABANA

(Tr., pp. 5 to 7.) "Vice President."

The following authorities establish beyond doubt that this letter was a libel per se, that is, as a matter of law.

California Civil Code, §46;

Bates v. Campbell, 213 Cal. 438;

Schoenberg v. Walker, 132 Cal. 224;

Stevens v. Snow, 191 Cal. 58;

New Iberis Extract, Etc. v. McElhaney, 132 La. 149, 61 So. 131;

Pennsylvania Iron Works v. Wright, 29 Ky. 1, 8 L. R. A. (N.S.) 102;

Dun v. Weintraub, 111 Ga. 416, 419, 50 L. R. A. 670;

Aetna Life Insurance Company v. Mutual Benefit Health and Accident Association, C. C. A. 8, February 28th, 1936, 82 Fed. 115.

[2] *This letter was not a privileged communication.*

Defendant does not directly argue that this letter of June 21st, 1931, written by defendant to Young's Market Company, a customer of both plaintiff and defendant, was a privileged communication, but indirectly urges this by charging that inasmuch as the letter was privileged, it was necessary that the complaint allege *actual malice*. (Appl. Br., pp. 146, 147, 154 and 155.)

This is, of course, not the law.

Section 47 of the California *Civil Code* defines a privileged communication as one made "* * * in a communication without malice to a person interested therein by (1) one who is also interested or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the com-

munication innocent, or (3) who is requested by the person interested to give the information. * * *."

This privilege is obviously a qualified one, only to be availed of if written (1) without malice, and (2) if the nature of the communication is innocent.

16 *Cal. Jur* 67, Section 38;
Clark v. McClung, 215 Cal. 279, 284.

In the very recent case of *Aetna Life Insurance Company v. Mutual Benefit Health and Accident Association*, supra, the general agent of the defendant insurance company wrote a letter to a sub-agent of the same company derogatory of the financial condition of a competing company. The Circuit Court of Appeals for the Eighth Circuit held that the libelous letter was not privileged, saying:

> "This was not a privileged communication within the legal conception of the term, nor under the authorities cited by counsel for defendant in support of this claim. To be privileged it must be honestly made, by a person interested in the subject-matter to one similarly interested, in order to protect that common interest. Newell, Slander and Libel (4th Ed.) §432. The parties must stand in such a relation that it is a reasonable duty, or is proper, for the writer to give the information communicated. Weise v. Brotherhood of Locomotive Firemen and Enginemen (C. C. A. 8), 252 F. 961, 963. The court in its charge instructed the jury that this communication was not privileged, and no exception was taken to that instruction, nor to any part of the court's charge. These two companies sustained no relations

> with each other and none was contemplated. It would be remarkable if a communication, having for its manifest object a harm to the business of a competitor, could be viewed as a bona fide discharge of a public or private duty, legal or moral, in the prosecution of the writer's own rights and interests (White v. Nichols, 3 How. 266, 11 L. Ed. 591), and the protection of the common interest involved. It has yet to be accepted that any business is privileged to advance itself by pulling down a competitor through unfair trade practices. It is to be noted that defendant's contention in pleading and brief is that Buchanan had no authority to write such a letter, and its vice president testified that, when the letter was brought to his attention, he criticized Buchanan for preparing it. In the face of the attendant circumstances the plea of qualified privilege cannot be indulged." (p. 119.)

No more need be said on this score.

[3] *It was entirely proper for the Court to permit the introduction of other letters sent by the defendant to both the May Company and Young's Market Company along the same tenor as the libelous letter set out in the complaint, all showing a plan to injure plaintiff's business and reputation.*

In this connection, reference may logically be made to defendant's exception to the introduction in evidence of other libelous letters besides the one mentioned in the complaint (Appl. Br., p. 157, et seq.).

These letters are all along the same line as the letter mentioned in the complaint, written either to the May

Company or to Young's Market Company and threatening to sue them if they did not discontinue sale of plaintiff's "French Veneer".

It is entirely well settled that in a libel action, letters written by the defendant either *before* or *after* the writing of the libelous letter complained of, are admissible to show malice on the part of the defendant and to show the existence of a plan or scheme to injure plaintiff's business or reputation.

Scott v. Times-Mirror Company, 181 Cal. 345, 362:

> "Any previous quarrel, rivalry or ill-feeling between plaintiff and defendant—in short, almost everything defendant has ever said or done with reference to the plaintiff—may be urged as evidence of malice. The plaintiff has to show what was in the defendant's mind at the time of the publication, and of that no doubt the defendant's acts and words on that occasion are the best evidence. But if plaintiff can prove that at any other time, before or after, defendant had any ill-feeling against him, that is some evidence that the ill-feeling existed also at the date of publication; therefore, all defendant's acts and deeds that point to the existence of such ill-feeling at any date are evidence admissible for what they are worth. * * *
>
> "In fact, whenever the state of a person's mind on a particular occasion is in issue, everything that can throw any light on the state of his mind then is admissible, although it happened on some other occasion. * * *
>
> "* * * The more the evidence approaches proof of a systematic practice of libeling or slandering the

plaintiff the more convincing it will be. (Odgers on Libel and Slander, 5th ed., pp. 348, 349.)

"Any other words written or spoken by the defendant of the plaintiff, either before or after those sued on, or even after the commencement of the action, are admissible to show the animus of the defendant; and for this purpose it makes no difference whether the words tendered in evidence be themselves actionable or not, or whether they be addressed to the same party as the words sued on or to someone else. Such other words need not be connected with or refer to the defamatory matter sued on, provided they in any way tend to show malice in defendant's mind at the time of publication. And not only are such other words admissible in evidence, but also circumstances attending the publication, the mode and extent of their repetition. The more the evidence approaches proof of a systematic practice of libeling or slandering the plaintiff, the more convincing it will be. (Newell on Slander and Libel, 3d ed., p. 405.)"

In fact, in all states except in New York and Tennessee, proof of repetition of defendant's libelous statement is no less admissible because it was made *even after the commencement of the action for the original publication.*

Norris v. Elliott, 39 Cal. 72;
Westerfield v. Scripps, 119 Cal. 607, 51 Pac. 958;
Hearne v. De Young, 119 Cal. 670, 52 Pac. 150;
Tingley v. Times-Mirror Company, 151 Cal. 1.

In fact the rule is so broad that other defamatory declarations by defendant concerning plaintiff may be

admissible *even though they are dissimilar in character to the statement sued on.*

Chamberlain v. Vance, 51 Cal. 75;
Stern v. Lowenthal, 77 Cal. 340, 19 Pac. 579;
Scott v. Times-Mirror Company (supra;
Earl v. Times-Mirror Company, 185 Cal. 165, 169.

See also discussing these rules:

12 *A. L. R.* 1026:

"It seems to be well settled that prior or contemporaneous utterances of other defamatory words, of similar import to those for which damages are claimed in an action for libel or slander, are competent to show malice on the part of the defendant.

"UNITED STATES.—Gibson v. Cincinnati Enquirer (1877), 2 Flipp. 121 Fed. Cac. No. 5,392; Post Pub. Co. v. Hallam (1893), 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 530, affirming (1893) 55 Fed. 456, and disapproving Frazier v. McCloskey (1875), 60 N. Y. 337, 19 Am. Rep. 193; Haskell v. Bailey (1894), 11 C. C. A. 476, 25 U. S. App. 99, 63 Fed. 873; Examiner Printing Co. v. Aston (1916), 151 C. C. A. 395, 238 Fed. 459.

"CALIFORNIA.—Preston v. Frey (1891), 91 Cal. 107, 27 Pac. 533."

12 *A. L. R.* 1029:

"Malice is the very gist of the action of libel or slander, and it follows that all the circumstances which go to prove it, or from which it may be inferred, necessarily enter into it. There is perhaps no circumstance which more strongly evidences animus in the publication of defamatory words, than

their frequent repetition. It is on this principle that many cases have held that words of similar import, spoken subsequently to those laid in the declaration, are admissible.

"California.—Marris v. Zanone (1892) 93 Cal. 59, 28 Pac. 845; Tingley v. Times Mirror Co. (1907) 151 Cal. 1, 89 Pac. 1097."

12 *A. L. R.* 1031:

"Except in New York (see infra, IV.) and Tennessee (see infra, VI.), proof of the repetition of a defamatory statement is none the less admissible because it was made after the commencement of the action for the original publication."

12 *A. L. R.* 1033:

"It is held by the weight of authority that, for the purpose of establishing malice, the plaintiff in a civil action for libel or slander may prove the publication by the defendant of other defamatory statements concerning him, though they are dissimilar in character to that sued on."

For a later discussion setting out the same rules, see:

86 *A. L. R.* 1297:

[4] *The damages awarded were not excessive.*

(a) There was sufficient evidence to sustain the award of actual or compensatory damages.

The jury awarded the plaintiff the sum of $11,000.00 for actual damages. In making this award, they were able under the law to take into consideration the following numerous items of damage:

(2) Business loss sustained by the plaintiff because of defendant's libelous interference with plaintiff's customers.

There was competent proof of three unimpeachable and uncontradicted witnesses showing that had plaintiff not been systematically libeled by defendant, and had she been allowed to retain her customers, that she would have built up a very substantial and profitable business.

Mr. B. L. Strauss, general merchandising manager of the May Company for many years, in substance testified that as a result of the defendant's letters to the May Company, they suspended the sale of French Veneer about April 2nd, 1929, and that French Veneer has been off the shelves of the May Company ever since because of threatened litigation by the defendant; that he had contemplated putting in French Veneer in the other May Company stores throughout the country; that preliminary arrangements for this had been made with Mrs. Smuckler but that he decided not to do so because of the threatened litigation by the defendant; that it was his mature judgment, based upon thirty years' experience in merchandising, that if plaintiff had not been harassed by the defendant her business would have expanded to a great extent because her product was genuine and a consistent demand for it had been created. (Tr., pp. 138 to 169.)

Mr. William Max, for many years Buyer for the household goods and hardware department of the May Company, testified in substance up on the question of damages as follows: That after the receipt by the May

Company of the libelous letter of March 27th, 1929, in which the defendant threatened to sue the May Company for selling French Veneer, that the sale of French Veneer was discontinued permanently and that not until April, 1930, was the new product French Polish sold at the May Company; that, therefore, there was a complete loss of business as far as French Veneer was concerned of more than a year and that because of the demand for French Veneer, he suggested to the plaintiff that the product be re-marketed under the new name. (Tr., pp. 170 to 174.)

Mr. E. C. Waddington, who at the time in question was an executive of Young's Market Company, had this to say upon the question of damages:

That French Veneer was taken out of stock at Young's markets immediately after the receipt of the libelous letter of June 2nd, 1931, which is set out in the complaint; that French Veneer previous to that sold excellently; that even after it was taken off the shelves there was a consistent and steady demand for the product; that in all his thirty years' experience in merchandising, he had never seen a similar product which sold so quickly after being first introduced. (Tr., pp. 174 to 190.)

All of this evidence was uncontradicted and unimpeached.

That plaintiff herself testified with respect to damages as follows :

That the only income which was necessary to sustain herself, her husband and a family of five children in a moderately comfortable station of life and over a period of nearly twenty years was obtained from the sale of

French Veneer; that until her business was practically limited to only the May Company and Young's Market Company because of the persistent intimidations of her customers by the defendant, she had about two thousand customers throughout the Pacific Coast and filled from twenty-five to fifty letter orders per day; that for a considerable number of years, she grossed about $1,000 per month and netted about $600.00 a month; that her income from polish sales was her sole income until 1929 when two of her sons partially assisted her; that even as late as 1929 her income from the sale of rench Veneer was between $300.00 and $400.00 per month; that since about 1930, she has been supporting herself by selling French Polish and French Silver Polish. This evidence was uncontradicted and must, therefore, be considered wholly true. (Tr., pp. 192 to 202.)

[2] In addition to actual loss to her business, the jury had the right to consider damage to plaintiff's reputation.

Scott v. Times-Mirror Co., 181 Cal. 345 at 365.

[3] The jury also had the right to award damages to plaintiff for her injured feelings and mental suffering caused by defendant's conduct.

Scott v. Times-Mirror Co., 181 Cal. 345 at 364.

Considering all of these elements, it certainly cannot be said that the jury was motivated by "passion or prejudice in such a degree as to shock the moral sense" (which as will be shown later is the test for setting aside excessive verdicts).

(b) The jury award of $9,000.00 punitive or exemplary damages were certainly not excessive.

First, let us devote a few words to defendant's complaint that exemplary damages were improper because they were not pleaded in the complaint. (App. Br., p. 205.) The argument made is so obviously erroneous and the citation of authorities by defendant are so carelessly made with reckless disregard of their true holdings, that we may be pardoned for referring to them in order to again demonstrate the continual piling up of arguments and authorities by defendant without serious analysis or checking of these authorities as to their pertinent application to the real facts and issues in our case.

The complaint clearly and distinctly charges *malice* on the part of defendant. Paragraph VI of the complaint in part alleges:

> "That for a long time prior to this date, the defendant has continuously and systematically and for the purpose of injuring the reputation and the business conducted by this plaintiff, caused letters to be mailed to various customers of this plaintiff for the purpose of destroying the business relations that existed between plaintiff and her customers, and that said letters were written for the *purpose of wilfully and maliciously injuring* the good name of the plaintiff and for the further purpose of destroying the business that plaintiff has established in the State of California and elsewhere." (Tr., pp. 4 and 5.)

Again, in Paragraph VII of the complaint, it is stated:

> "That by the foregoing false, malicious and defamatory language, the defendant, Liquid Veneer

Corporation, intended to and did convey the meaning that the plaintiff had infringed upon a right that the defendant, Liquid Veneer Corporation, * * * etc." (Tr., p. 7.)

And again in Paragraph IX:

"That the statements contained in the communications addressed by the defendant, Liquid Veneer Corporation, were false, malicious and untrue, and were made only for the purpose of destroying the good name and reputation and business of this plaintiff, and that by reason of the same false, malicious and defamatory publication aforesaid, plaintiff has been and is greatly injured and prejudiced, and that the reputation of her business has been prejudiced and injured and she has lost and been deprived of great gain and profit which would otherwise have arisen and accrued to her in her said business." (Tr., p. 8.)

And the prayer of the complaint plaintiy asks for:

"2. For such sum that the court may deem just and equitable in the form of exemplary and/or punitive damages." (Tr., p. 9.)

The instructions of the Court to the jury clearly and distinctly made *malice* an issue for the jury to pass upon.

"In addition thereto, however, gentlemen, the law in this state and, I guess in every state, provides for what are known as exemplary damages that mean something different from actual damages.

"In an action for the breach of an obligation not arising from contract, such as is charged in this case, where the defendant has been guilty of oppression or fraud or malice—and in this case it would mean

express malice—the plaintiff in addition to actual damages may recover damages for the sake of example and by way of punishing the defendant.

"If, now, you think that this method used by the defendant was engendered and rested in the purpose to destroy the business of the plaintiff, was done and made with ill-will toward the plaintiff, or accompanied and did itself consist in an act of oppression, then you are at liberty to award exemplary damages: that is, exemplary as opposed to compensatory, meaning damages that are to reimburse for actual loss suffered, and you may award exemplary damages, that is, damages by way of example." (Tr., pp. 217 and 218.)

With this situation evident, it is clear beyond controversy that a verdict for exemplary damages was entirely proper. The law is clearly stated as follows:

16 *Cal. Juris.* 143:

"An allegation of express malice and an intent to injure plaintiff's reputation, followed by a general prayer for damages, is sufficient to sustain an award for punitive damages, though not expressly prayed for."

Waite v. San Fernando Publishing Company, 178 Cal. 303 at 307, 173 Pac. 591:

"The appellants' final contention is that the verdict of the jury was contrary to law, in so far as it undertook to assess punitive damages against the defendant for being actuated by actual malice in making the publication complained of. Much of the argument addressed to this point is occupied with a dis-

cussion of the evidence and the deductions to be drawn therefrom, but these were matters for the jury. The complaint charged the defendants with express malice and with the malicious intent of injuring plaintiff's reputation. There is sufficient evidence in the record to have justified the jury in finding these averments to be true. The plaintiff, it is true, did not expressly pray for punitive damages in so many words, but he did ask for a general verdict for damages in the sum of twenty thousand dollars. This was sufficient to have justified the jury in making its award of the sum allowed for exemplary damages. We find no merit, therefore, in the appellants' contention in this regard."

With the law so clear and so plain, it must be concluded that defendant is attempting to mislead this Honorable Court when it cites unexplained excerpts from four California cases, as follows:

Syfert v. Solomon, 95 Cal. 228, 237 (App. Br., p. 205), was a case involving breach of promise. While it is true the Court stated as excerpted by defendant that "no recovery of exemplary damages can be had unless such damages are alleged in the complaint", yet, it is plain that "the complaint alleges no facts which would constitute malice. * * * As malice was not made an issue in the case, either through pleadings or otherwise, it was error for the Court to instruct them that they might place a verdict for punitive damages thereon."

Belm v. Patrick, 109 Cal. App. 599 (App. Br., p. 205), was also a case involving breach of promise. Besides the quoted sentence to-wit, "It has also been held that in the

absence of such allegations it was error to award punitive damages though the evidence showed malice and oppression on the part of defendant," the Court stated,

> "while exemplary damages need not be described by that name in the complaint, it is necessary that the facts justifying a recovery of such damages be pleaded * * * and in actions for a breach of a marriage promise something more than a mere refusal without sufficient excuse to perform the contract must be shown in order to authorize such an award. * * * In the present case the complaint contains no allegations of fraud or deceit * * * or was actuated by evil motives, nor does the evidence establish any of these facts or more than a refusal without sufficient excuse to perform the contract." (p. 607.)

The quotation from *O'Donnell v. Excelsior Amusement Company*, 110 Cal. App. 685 (App. Br., p. 206), which by the way was a case of assault and battery, is so obviously inapplicable to our case that no comment is needed.

The same is sufficient to dispose of defendant's reference to the case of *Taylor v. Lewis*, 132 Cal. App. 381 (App. Br., p. 206). In that case the Court held that the writing itself was not even libelous or defamatory.

This reference to defendant's proffered authorities and the careless analysis speaks for itself.

Now as to the amount itself, the Court will probably agree with counsel as well as with the jury itself that the defendant's conduct as reflected by the undisputed evidence was probably as reprehensible a case of willful viciousness as could be conceived.

The law gives the jury the right to award damages by way of example, and here the latitude of the jury is extremely broad.

Scott v. Times-Mirror Co., 181 Cal. 345 at 367:

> "In the matter of punitive damages it is clear from the authorities that juries have a wider discretion in this regard than they have in the matter of compensatory damages. (Cases cited.) In Luther v. Shaw, 157 Wis. 234, * * * the court in affirming the award of punitive damages said: 'Where the jury are properly given such broad discretion with reference to exemplary damages, as indicated by the code of instructions whereby they were told they might assess against the defendant a sum which they deemed just and proper, and best calculated to be an example to him and to others, such jury are entitled to observe these instructions in good faith as meaning just what they say. How, then, can it be said that their verdict is perverse? They disregarded no evidence and violated no instructions in fixing these exemplary damages. Their estimates of what would be sufficient as a punishment and a deterrent and an example was very high as compared with the actual damages assessed and high from any point of view, but it would hardly be candid to invite them in the language of this instruction to fix such sum which expressed their judgment in such matter, and then charge them with bias or perversity because the measure of their abhorrence of defendant's conduct and their judgment of what would be a sufficient punishment and deterrent was represented by a larger sum of money than that which some other man or men would have allowed."

[c] In considering the extent of the award of damages both compensatory and exemplary, the jury properly has the right to consider the wealth and financial standing of the defendant company. This is an element that goes to the fairness of the award.

Marriott v. Williams, 152 Cal. 705;
Barclay v. Copeland, 74 Cal. 1.

[d] The amount of damages is a question properly left with the jury and should not be disturbed by the Court.

In *Wilson v. Fitch*, 41 Cal. 386, where there was no proof of actual malice, and as was held by the Court, not even a case for punitive damages, it was said in answer to the claim that the damages awarded were excessive:

> "The court will not interfere in such cases, unless the amount awarded is so grossly excessive as to shock the moral sense and raise a reasonable presumption that the jury was under the influence of passion or prejudice. In this case, whilst the sum awarded appears to be much larger than the facts demanded, the amount cannot be said to be so grossly excessive as to be reasonably imputed only to passion or prejudice in the jury. In such cases there is no accurate standard by which to compute the injury, and the jury must necessarily be left to the exercise of a wide discretion, to be restricted by the court only when the sum awarded is so large that the verdict shocks the moral sense and raises a presumption that it must have proceeded from passion or prejudice."

The above language is adopted with approval by the Supreme Court of California in *Scott v. Times-Mirror Co.* (supra). See also 20 *Cal. Jur.* 101.

Cyc. of Fed. Proc., Vol. 5, p. 16:

> "Where the jury has been properly instructed, the court is not inclined to interfere with the verdict because of objections as to its amount. It should not be set aside where there is any margin for a reasonable difference of opinion in the matter, for in such case the view of the court should yield to the conclusion of the jury."

To a Court intimateily familiar with the make-up of Federal Court juries, the charge that a verdict of a Federal jury in a matter of this sort is "so grossly excessive as to shock the moral sense and raise a reasonable presumption that the jury was under the influence of passion or prejudice" carries little conviction. A more reasonable, more sensible, more contrained, more painstaking and fairer lot of men would indeed be hard to find.

If a Federal Jury awarded the plaintiff $20,000.00 damages both actual and punitive, this Honorable Court may rest assured it represents an eminently fair and reasonable award.

[5] *The instructions were fair and did not prejudice the defendant.*

From pages 189 to 199, defendant in its brief describes alleged erroneous instructions.

It is difficult to tell just what defendant is complaining about. But we gather that it deals mainly with the question of an instruction regarding the privileged or un-

privileged character of a libelous letter named in the complaint.

The Court defined a privileged communication as it is set out in Section 47 of the *California Civil Code*, except that by a slip of the tongue he once used the word "unprivileged" instead of "privileged." But by saying further "if malice exists, then privilege cannot be claimed" it was made clear to the jury that the Court was speaking of what constitutes a privileged communication. (Tr., p. 213.) Later on, defendant's counsel called the Court's attention to something further on privileged communications, as follows:

> "Mr. Sheehan: Your Honor, I believe your Honor misspoke when you first addressed the jury and you said 'unprivileged' when your Honor really meant 'privileged'. In your definition of the privileged communication, that it is a communication by one person having an interest in the matter to another person having a like interest, that is, between two business houses, and I think your Honor misspoke on that.
>
> "The Court: I read the section. That ought to be good enough.
>
> "Mr. Sheehan: You did, but you misspoke yourself, your Honor, as I recollect it.
>
> "I wish to except to your Honor's failure to give each instruction submitted by defendant; and also except to all plaintiff's proposed instructions as far as those were given.
>
> "I then wish to except to that part of your Honor's charge in which you stated that in a privileged communication that if the matters were false, that that could be charged against the defendant;

and I ask your Honor to charge that if the communication is privileged that even though the matters were false or uttered under a mistaken belief that the communication still remains privileged.

"The Court: Yes, you may take that instruction. I think that is correct. However, I emphasize or intended to emphasize, that true or false, it must be done in good faith. Very well.

"Mr. Sheehan: And just the other, the statute says that malice cannot be inferred before or after in a privileged communication.

"The Court: Yes." (Tr., pp. 218 and 219.)

Although the Court's instructions on this subject could probably have been more artfully articulated, there was no prejudicial error to the defendant company:

[1] The Court distinctly instructed the jury that they could find no exemplary damages unless they also found *express malice.* (Tr., p. 217.) The jury found exemplary damages; they, therefore, under the instruction must have found that there was express malice. If they found there was express malice then under any definition of a privileged communication there could have been no privilege in this case, because a privileged communication regardless of falsity must be without malice and innocently communicated. (*California Civil Code,* Section 47.)

[2] Appellant first argues that the instruction given by the Court on privileged communications was inadequate (App. Br., p. 189) and then turns about face and says (App. Br., p. 196) that the Court erred because it should have decided as a matter of law whether this letter was privileged, and should not have submitted it to the

jury at all. If that is true, then the Court gave the defendant an additional advantage by letting the jury even consider this matter, because as a matter of law there can be no other possible interpretation of the letter except that it was clearly unprivileged.

In any event, the test of a Court's instruction is whether they *as a whole* state the case fairly for the defendant.

4 *Cyc. Fed. Proc.*, Section 1451, p. 989. (Also Footnote 97):

> "The principal rule for construction probably is that the charge will be construed as a whole, and the jury will be presumed to have understood and considered it as such.
>
> "97 Therefore, among other consequences an error in one part of the charge will be deemed to have been overcome by any corrective other portion, and the error thus made harmless or cured."

24 *Cal. Juris.*, p. 857, et seq.:

> "It has been often stated that a trial court is not required to state all of the law applicable to a case in a single instruction. The charge must be read as a whole, that is to say, the instructions given should be considered in connection with each other; and if, without straining any portion of the language, the charge harmonizes as a whole and fairly and accurately states the law, a reversal may not be had because of verbal inaccuracies, because isolated sentences and phrases are open to just criticism, or because a separate instruction does not contain all of the conditions and limitations which are to be gathered from the entire charge."

An examination of the instructions shows beyond doubt that every intendment was made in favor of the defendant; the Court was entirely fair, stated the law correctly, did extremely little commenting upon the evidence and left the vital issues for the jury to decide. If anything, many correct and favorable instructions submitted by the plaintiff which could have substantially helped her case were entirely ignored by the Court. In any event, it certainly cannot be said that had the instructions been given identically as appellant would have it, that, considering all of the evidence in the case, the verdict would have been different. The errors, if any there be, are, therefore, clearly cured by the verdict.

24 *Cal. Juris.*, p. 868, Section 117, and cases cited.

24 *Cal. Juris.*, p. 862, and cases cited:

> "As in other cases, to justify a reversal [on grounds of erroneous instructions] it must appear that a miscarriage of justice resulted."

V.
THE JUDGMENT SHOULD BE AFFIRMED

The law is too well settled to require lengthy citations of authorities that every intendment must be made to sustain a judgment fairly reached.

6 *Cyc. Fed. Proc.*, p. 615.

Only if there are errors in the record which substantially have prejudiced the losing party should a judgment be reversed.

Title 28, *U. S. Code Ann.*, Section 391;
Dimmitt v. Breakley, 267 Fed. 192, Cert. Den. 254 U. S. 641.

It is incumbent on a party appealing from a judgment substantially just to point out not merely that there was technical error in the admission or rejection of evidence but that it was of such a nature that prejudice might reasonably have resulted therefrom.

This is equally well established as California law.

California Constitution, Article VI, Section 4½;
California Code of Civil Procedure, Section 475.

It is submitted that when the record as a whole is carefully read, the defendant had a fair trial and the verdict was fairly and impartially rendered.

VI.
SUMMARY AND CONCLUSION

This discussion has of necessity been so long that it may be well to briefly summarize the situation:

(1) Defendant has complained that the Secretary of State should not have been served because there is no showing that there was no one else who could have been served.

Plaintiff answers:

[a] In the first place, this technical argument is raised for the first time after trial and verdict, and should, therefore, be considered as having been waived; and

[b] The record and defendant's own affidavits show beyond doubt that defendant had no serviceable agent in California who could have been served with process; and

[c] It was, therefore, entirely proper for plaintiff to follow the statutory procedure set out in Section 406a of the *California Civil Code* and serve the Secretary of State for and on behalf of the defendant.

(2) Defendant complains that it was not doing business in California when it was served with process.

Plaintiff's answer:

[a] That by oral and documentary evidence it has been proved that defendant maintained a regular stock of merchandise in a warehouse in San Francisco from which stock orders were filled as they came in without it being necessary to have these orders first approved at Buffalo or without it being necessary to have these orders filled by merchandise sent directly from Buffalo.

[b] That under the law this constitutes "doing business" in California.

[c] That defendant's numerous ex parte affidavits on this issue of "doing business" in California were entitled to very little, if any, credence because they have in large part been discredited by actual repudiations.

(3) Defendant complains of numerous supposed errors in rulings and reception of evidence.

Plaintiff answers:

[a] These have all been analyzed and found to be without merit; and

[b] If there were any errors they were not substantial or prejudicial to the defendant in view of the entire record.

(4) Defendant complains that the judgment should be reversed.

Plaintiff answers:

[a] That there is ample evidence in the record to sustain the verdict.

[b] That the evidence is practically uncontradicted in every respect.

[c] That the jury's award of actual and exemplary damages should not be interfered with by this Honorable Court.

We have conscientiously and with great labor endeavored to squarely meet each and every assumed error raised by the defendant. That this task has been a long and tedious one is not due to any intrinsic difficulties in the case itself, but rather was necessitated by the unneces-

sary length to which the defendant resorted in its treatment of the case.

Stripped of imaginary errors repeated many times, the case is rather a simple one:

The plaintiff, a woman now well past 60 years of age, has fought long and hard to bring the defendant to the bar of justice. The verdict of the jury is not only a vindication of the rightfulness of her cause but is as well, compensation in part at least for her years of struggle against defendant's malicious abuse and underhanded undermining of her business and reputation. This case has been in actual litigation now for nearly five years and judging from past experience with it, much more labor will be necessary before the defendant will be forced to pay the award. We submit her cause to this Honorable Court fully confident that plaintiff's struggle has not been in vain.

Respectfully submitted,

HARRY GRAHAM BALTER,
Attorney for Appellee.